

THE NATIONAL BUREAU OF STANDARDS

DEPARTMENT OF COMMERCE



THE OFFICIAL BUREAU OF STANDARDS

DEPARTMENT OF COMMERCE

THE NATIONAL BUREAU OF STANDARDS

(28,779)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 309.

THE CITY NATIONAL BANK OF EL PASO, TEXAS,
PETITIONER,

vs.

EL PASO & NORTHEASTERN RAILROAD COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS,
EIGHTH SUPREME JUDICIAL DISTRICT OF THE STATE OF
TEXAS.

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1 In the Supreme Court of United States.

No. —.

THE CITY NATIONAL BANK OF EL PASO, TEXAS, Petitioner,

vs.

THE EL PASO & NORTHEASTERN RAILROAD COMPANY et als.,
Respondents.

CERTIFIED COPY OF THE TRANSCRIPT OF THE RECORD, INCLUDING
ALL PROCEEDINGS HAD, IN SAID CAUSE IN THE COURT OF CIVIL
APPEALS OF THE EIGHTH SUPREME JUDICIAL DISTRICT OF THE
STATE OF TEXAS, AT EL PASO, TEXAS.

Caption.

THE STATE OF TEXAS,
County of El Paso:

Be it remembered, that at a term of the Honorable Court of Civil
Appeals in and for the Eighth Supreme Judicial District of the State
of Texas, begun and holden in the City and County of El
2 Paso and State aforesaid on the 4th day of October, A. D.
1920, and ending on the 30th day of June, A. D. 1921, the
following cause came on to be considered and determined on appeal
and the following proceedings were had therein, to-wit:

No. 1116.

THE CITY NATIONAL BANK OF EL PASO, TEXAS, Appellant,

v.

EL PASO & NORTHEASTERN RAILROAD COMPANY et als., Appellees.

Caption.

THE STATE OF TEXAS,
County of El Paso:

At a term of the District Court, 41st Judicial District, begun and
held at El Paso, within and for the County of El Paso, before the
Honorable P. R. Price, Judge, and ending on the 31st day of October,
1919, the following cause came on for trial, to-wit:

In the Forty-first District of El Paso County, Texas.

No. 9181.

CITY NATIONAL BANK

v.

EL PASO & SOUTHWESTERN COMPANY et al.

Plaintiff's Amended Petition.

Filed Dec. 24, 1914.

Now comes plaintiff, City National Bank, and by leace of the Court first had and obtained, amends its petition hereinbefore filed in this cause on the 20th day of February, A. D., 1912, and for amendment says:

Your petitioner, City National Bank, hereinafter styled plaintiff, and complaining against the El Paso & Southwestern Company, the El Paso & Northeastern Railroad Company, the El Paso & Northeastern Railway Company, the El Paso & Rock Island Railway Company, the Chicago, Rock Island & El Paso Railway Company, the Chicago, Rock Island & Gulf Railway Company, and the Chicago, Rock Island & Pacific Railway Company, hereinafter styled defendants, respectfully represents to the Court:

I.

That the said plaintiff, City National Bank is a banking corporation duly incorporated and doing business in said City and County of El Paso, in the State of Texas, and that each of said defendants is a private railway corporation and doing business as common carriers, and were on the dates hereinafter mentioned, each with an office in said city and county of El Paso, State of Texas. That the said defendants were on the dates hereinafter mentioned, and now, constitute a through line connecting common carriers for the transportation of passengers and freight for hire between the station of El Paso, in the City of El Paso, State of Texas, to the City of Kansas City in the State of Missouri, running from El Paso through the County of El Paso to the State of New Mexico, and through the State of New Mexico, and through the State of New Mexico in and to the City of Kansas City in the State of Missouri.

II.

That the said defendants, El Paso & Southwestern Company, the El Paso & North Eastern Railroad Company, the El Paso & North Eastern Railway Company, the El Paso & Rock Island Railway Company are partners, and were such on the dates hereinafter mentioned, and were then, and are now, operating

their lines jointly under contracts of joint operation under the name of the El Paso & Southwestern System or Southwestern Company, and sharing the profits and losses therefrom under and by the terms upon which they are transporting freight are fixed rates over their lines and the lines of the other defendants herein mentioned agreed on by and between them, and each and all of the above named defendants are jointly interested in the *in the* particular shipment of cattle hereinafter referred to, and shared in the profits and losses obtained therefrom.

III.

That heretofore, to-wit, on the 27th day of October, A. D. 1911, the said defendants operating said through line under said agreement for and in consideration of the lawful freight rates paid to said defendants the El Paso & Southwestern Company, the El Paso & North Eastern Railroad Company, acting for themselves, and for their co-defendants, herein named, agreed in writing signed and executed by and between the said plff. & defendant, the El Paso & Southwestern Company safely to carry from the City of El Paso, Texas, to the City of Kansas City, Missouri, and there to deliver to the First National Bank, a corporation duly incorporated, the consignee at said place Eight Hundred and Forty-seven (847) head of cattle, of the reasonable value of Twenty Thousand Dollars (\$20,000.00), the property of said plaintiff then and there at El Paso, Texas, in pursuance of said written agreement bearing date October 27th, 1911, delivered to said El Paso & North Eastern Railroad Company in pursuance of said agreement made with said El Paso & Southwestern Company, who then and there received and accepted the same upon the agreement and for the purposes above mentioned in behalf of said defendants.

IV.

That defendants did not safely carry and deliver said cattle in pursuance of said agreement as they were in duty bound so to do, but on the contrary so carelessly and negligently acted in regard to the same in their business as common carriers that the said cattle were wholly lost to the plaintiff, and were not delivered to the said consignee to plaintiff's damage in the sum of Ten Thousand One Hundred One and 18/100 (\$10,101.18) Dollars.

That defendants have failed and refused, and still fail and refuse to deliver said cattle to the said First National Bank, consignee, in pursuance of said agreement, or to plaintiff, and by reason of the carelessness and negligence of the defendants, their servants, agents and employees, the plaintiff is damaged as aforesaid.

Wherefore, plaintiff prays the Court that the El Paso & Southwestern Company, the El Paso & North Eastern Railway Company, the El Paso & Rock Island Railway Company, the Chicago, Rock Island & El Paso Railway Company be duly cited to appear and

6 answer herein. That the El Paso & Northeastern Railroad Company, the Chicago, Rock Island & Gulf Railway Company and the Chicago, Rock Island & Pacific Railway Company having heretofore been cited and having answered herein no citation issue as to them.

Plaintiff prays judgment for its damages in the sum of Ten Thousand One Hundred One and 18/100 — (\$10,000.00) and interest and costs, and for such other and further relief, special and general, in law and equity, that it may show itself to be entitled to.

J. F. MCKENZIE AND
T. A. FALVEY,
Attorneys for Plaintiff.

(Endorsed:) No. 9181. In the 41st Judicial Dis. Court El Paso County, Texas. City National Bank, Plaintiff, versus El Paso & Southwestern Company, et al. Defendants. Filed this 24th day of Dec. 1914. J. A. Escajada, Clerk of the Dist. Court. By J. N. Phillips, Deputy.

In the District Court of the 41st Judicial District, El Paso County, Texas.

No. 9181.

CITY NATIONAL BANK

v.

EL PASO & SOUTHWESTERN COMPANY et al.

Defendants' First Amended Answer.

Filed Sept. 8, 1919.

Comes now the defendants and with leave of court file this, their first amended answer; and

I.

7 They except to plaintiff's petition filed herein December 24, 1914, and say that the same is insufficient in law for plaintiff to have and obtain this action, and of this pray judgment.

II.

The defendants deny each and every allegation in said petition contained and say that they are not guilty of the wrongs and trespasses therein charged against them, and of this they put themselves upon the country and pray judgment that the plaintiff take nothing as against them, or either of them.

III.

The defendants show that plaintiff's original petition was filed February 20, 1912, complaining of a non-delivery of cattle shipped on the 27th day of October, 1911, to Kansas City, and arrived at Kansas City at about October 30, 1911; that said petition complained of, and process was served only upon the El Paso & Northeastern Railway Company, the Chicago, Rock Island & Gulf Railway Company and the Chicago, Rock Island & Pacific Railway Company; that thereafter, to-wit: December 24, 1914, the plaintiff amended its petition and complained of and prayed process against the El Paso & Southwestern Company, the El Paso & Northeastern Railroad Company, the El Paso & Northeastern Railway Company and the Chicago, Rock Island & El Paso Railway Company, and said four last named defendants show that no suit was brought against them or process served upon them prior to December 24, 1914, and that as to them the cause of action which plaintiff asserts, accrued more than two years prior to the filing of suit against them, therefore, that the said cause of action is, as to said last four named defendants, barred by the Statute of Limitation of Two Years, and as to this, their plea of limitation in behalf of the company's named the defendants pray judgment; that plaintiff take nothing as against them and that they go hence and recover their costs.

IV.

Answering further in this behalf the defendants, El Paso & Southwestern Company, the El Paso & Northeastern Railroad Company and the El Paso & Rock Island Railway Company, deny that they are partners or were partners on the dates mentioned in plaintiff's petition, and they show that on the dates mentioned in plaintiff's petition, the El Paso & Northeastern Railroad Company owned and was operating a line of railroad situated in the State of Texas, extending from the City of El Paso to the boundary line between Texas and New Mexico at about a station called Newman, and that no other of said defendants last named had anything to do with the operation of the said line. They further show that at the time and now the railroad of the El Paso & Northeastern Railway Company which extended from the Station Newman, above named, to the station —, and the railroad of the El Paso & Rock Island Railway Company which extended from said last named station to Santa Rosa, in the State of New Mexico, were operated by the El Paso & Southwestern Company.

V.

For further plea in this behalf, these defendants show that on, to-wit: the 27th day of October, 1911, the City National Bank, acting by and through one J. A. Peters, its agent in that behalf and for that purpose, entered into a written contract with the El Paso & Southwestern Company for the transportation

of about 847 head of cattle to Tucumcari, New Mexico, en route to Kansas City and consigned in said special contract to the First National Bank of Kansas City, and these defendants show that said shipment was an interstate shipment and that, among other provisions contained in said special contract was the following:

"And that as a condition precedent to bringing any suit for damages for loss or injury to the person, or persons, or property, covered by this contract, the claimant shall give notice in writing of the claim for damage to some general officer, claim agent or station agent of the said first party (El Paso & Southwestern Company) not later than four (4) months after the date of the loss or injury claimed, and any failure to strictly comply with this provision shall be a bar to recovery of any and all damage occasioned to the person or persons, or property, embraced in, or being transported, under this contract."

And further in connection with the matters alleged in this paragraph these defendants show that at about the date stated the El Paso & Southwestern Company contracted to carry the cattle to Tucumcari, New Mexico, en route to Kansas City, Missouri, but that contemporaneously with the execution of said contract, and immediately subsequent thereto, the said J. A. Peters, acting for and on behalf of the plaintiff herein, and as its shipping agent, instructed and directed the initial carrier to bill said cattle to the First National Bank of Kansas City in care of the J. P. Peters Commission Company, a live stock commission firm of that City; that in accordance with said instructions and directions, waybills were executed in writing covering said shipment in which the name of the shipper was stated to be the City National Bank, the name of the consignee and destination was stated to be the First National Bank, Kansas City, Missouri, care of J. P. Peters Commission Company with the privilege of St. Louis, Missouri; that said waybills were so drawn and executed in accordance with instructions and as directed by the said J. A. Peters, Agent of the shipper; that said cattle so billed were caused to be transported to Tucumcari, New Mexico, by the El Paso & Southwestern Company and there delivered to connecting carrier along with said waybills for transportation to Kansas City, Missouri; that one Lester Hunt accompanied said cattle on behalf of and in the interest of the consignor to care for the same en route to destination; that at Herrington, Kansas, about the 30th day of October, 1911, while the cattle were in charge of the defendant, Chicago, Rock Island & Pacific Railway Company the consignor City National Bank, by and through its said agent Lester Hunt, in writing, executed by said City National Bank through Lester Hunt, directed said defendant that said cattle were consigned to Peters Commission Company, Kansas City.

VI.

11 All of these defendants deny that they, or either of them, failed to safely carry and deliver said cattle, or that they acted carelessly and negligently in regard to the same, but show

that in accordance with the instructions of J. A. Peters, the shipping agent of the consignor, and in accordance with the written instructions of Lester Hunt, Agent of the plaintiff in charge of said cattle, the defendant, Chicago, Rock Island & Pacific Railway Company, acting upon said waybills which had been delivered to it as governing and controlling the destination and delivery of said cattle and said written instructions from the plaintiff's agent accompanying the cattle, delivered the same at Kansas City, Missouri, and Kansas City, Kansas, to the J. A. Peters Commission Company.

VII.

And further answering in this behalf these defendants deny any agreement to deliver said cattle to the First National Bank; they admit that the First National Bank was consignee in the live stock contract, but show that by the instructions of plaintiff, through its agents, Peters and Hunt, they were instructed and directed, subsequent to the execution of the said -mission Company, and they deny that they have been guilty of live stock contract, to deliver the cattle to the J. P. Peters Comp — any carelessness or negligence; they show that there existed at the time of this shipment at Kansas City and other points as well known and established custom, known to the plaintiff and its agents, that the live stock contract should be retained by the shipper's employees to serve as return transportation, and that, therefore, the delivery of the cattle should be governed by instructions contained in the waybills; and show
12 further that in addition to, and without regard to said custom, it was their duty to deliver the cattle in accordance with the instructions of shipper's agent in charge of the shipping and accompanying said cattle; they show that the live stock contract at El Paso was entered into by the City National Bank and executed by its agent, J. A. Peters, for it; that all the negotiations covering the shipment were conducted by J. A. Peters and that, in accordance with his instructions, the cattle were waybilled in care of the J. P. Peters Commission Company, and that these defendants were authorized, and it was their duty to deliver the same in accordance therewith, which they did.

VII-a.

That at the time the contract for shipment of the cattle involved in this suit was executed, the City National Bank, the plaintiff herein, acting through its agent, J. A. Peters and with the purpose and intention of so directing shipment of said cattle that when the same arrived in Kansas City, they could be unloaded from the cars without delay, requested and instructed defendants to forward said cattle under shipping instructions whereby the delivering carrier should immediately deliver said cattle to the J. P. Peters Commission Company; and in order to effect such delivery, instructed defendants to ship said cattle to First National Bank of Kansas City in care of the J. P. Peters Commission Company. That said shipping directions were made at the request of and on behalf of plaintiff and for the

- benefit of plaintiff, it being known to plaintiff that the First National Bank of Kansas City did not maintain any night office in Kansas City and did not open its office in Kansas City until about nine o'clock in the morning of each working day, and that it closed its office about four o'clock in the afternoon of each working day and that in the event said cattle arrive in Kansas City after the closing of the office of the First National Bank in the afternoon and before the opening thereof in the morning, that no delivery could be made to said First National Bank immediately upon arrival of said cattle at Kansas City, but that would have to be held by the delivering carrier until a delivery could be made to said Bank, probably causing delay to such an extent that said cattle could not be fed and watered and placed upon the first open market after said cattle arrived in Kansas City; that the shipping orders so given were in fact a part of the contract of shipment and were included in the agreement between the plaintiff and defendants as to the transportation of said cattle, to-wit: That the defendants by their agents, servants and employees, at the request of plaintiff, received said shipping directions from the plaintiff in good faith, and the same were endorsed on the waybills accompanying said shipment, which said waybills are described in said original contract and are a part thereof, being series F and numbered 779 to 807 consecutively and inclusive, and in good faith acted thereupon and thereunder in the delivery of said cattle as they were so directed by plaintiff to do, and the failure of the plaintiff to consign said cattle in said live stock contract in care Peters Commission Company and the failure to endorse said shipping directions thereon, otherwise than by reference thereon to said waybills in and upon which waybills said shipping directions "care J. P. Peters Commission Co." were endorsed, constituted fraud on the part of the plaintiff or was the result of mutual mistake on the part of plaintiff and defendant.

VII-b.

That the original contract of shipment provided for the carriage of said cattle to the station of Tucumcari, which is a station in the State of New Mexico, enroute from El Paso to Kansas City and which said station was at the time well known to plaintiff to be so situated in the State of New Mexico; that under the rules and regulations and customs of transporting livestock, which rules, regulations and customs were at the time well known to plaintiff, it was necessary for plaintiff at the said station of Tucumcari to execute a new contract of shipment with the connecting carrier; that plaintiff well knew that the said Lester Hunt would be called upon and required by said connecting carrier to execute on plaintiff's behalf such new contract at the station of Tucumcari, covering said shipment from said station of Tucumcari, New Mexico, to Kansas City. That the said original waybills according to the rules, regulations and customs governing shipments of live stock of the character and nature herein involved bearing the shipping instructions with reference to the delivery to First National Bank in care of J. P. Peters Commis-

sion Company, Kansas City, accompanied said shipment throughout from the point of origin to the point of destination and were passed on from division to division and from carrier to connecting carrier throughout the entire course of transportation from point of origin to destination and likewise were a part of the agreement and shipping contract entered into by plaintiff through its agent Lester Hunt at Tucumcari, New Mexico, same being referred to and described in said contract as in the original contract, and the failure of the plaintiff to consign said cattle in said live stock contract in care Peters Commission Company and the failure to endorse said shipping directions thereon, otherwise than by reference therein to said waybills in and upon which waybills said shipping directions "care J. P. Peters Commission Co." were endorsed, constituted fraud on the part of the plaintiff or was the result of mutual mistake on the part of plaintiff and defendant.

VIII.

These defendants further show that on September 29, 1911, the City National Bank of El Paso shipped to Kansas City ten cars of cattle consigned to the First National Bank; that on October 4, 1911, the City National Bank shipped to Kansas City twenty-five cars of cattle consigned to the First National Bank; that on October 5, 1911, the City National Bank shipped to Kansas City ten cars of cattle consigned to the First National Bank; that on October 7, 1911, the City National Bank shipped to Kansas City twelve cars of cattle consigned to the First National Bank; that on October 11, 1911, the City National Bank shipped to Kansas City twenty-four cars of cattle consigned to the First National Bank; that on October 13, 1911, the

City National Bank shipped to Kansas City twenty cars of cattle consigned to the First National Bank; that on October 23, 1911, the City National Bank shipped to Kansas City, consigned to the First National Bank, two shipments of cattle, one of twenty cars of cattle and the other of nineteen cars of cattle; that each and every of said live stock contracts covering said shipments last mentioned was executed by the City National Bank through J. A. Peters, save and except the one of October 13, 1911, which was executed, City National Bank by J. P. Peters Commission Company, by Davis; that the waybills covering each and all of said cattle stated the consignee to be the First National Bank of Kansas City in care of J. P. Peters Commission Company; and that said billing was made in accordance with the instructions of the said City National Bank through its said agent J. A. Peters and its agent Davis, as alleged; that each and every of said shipments were by the defendant, Chicago, Rock Island & Pacific Railway Company delivered to the J. P. Peters Commission Company, under exactly the same circumstances as this shipment was delivered to it, and without further notice or notification to the said First National Bank than as hereinafter stated in regard to this shipment; that by its action in regard to said previous shipments mentioned, which were all a part of the same lot of cattle, the plaintiff induced and lead the defendants to believe that a delivery to the J. P. Peters Commission Company was in full ac-

cordance with the live stock contracts and waybills and was satisfactory to, and desired by, the City National Bank; that acting upon the belief so induced and in accordance with the instructions of the

agents of said consignor, as hereinbefore set out, the delivering
17 carrier delivered these cattle, as it has done others, to the J. P.

Peters Commission Company, all of which facts were well known to the consignor, the plaintiff herein, and it is now estopped to question the validity and correctness of the delivery made in this instance.

IX.

These defendants further show that they are informed and believe, and so charge the facts to be, that the City National Bank of El Paso, Texas, was not, in fact, the owner of said cattle, but was the consignor in the shipment involved in this case because it had advanced money to pay in part for the cattle, and was made consignor for the purpose of securing it in said advances, and the defendants aver and charge, on information and belief, that it was not the owner of the previous shipments, but in like manner, had advanced money against said cattle, and these defendants aver, on information and belief, as to the cattle involved in this shipment, that it was the intention and purpose of the consignor and its agents, and of the consignee, that the cattle should be delivered to the J. P. Peters Commission Company, and that they should sell them and pay a draft drawn by the City National Bank for the amount of its advances on them through the First National Bank of Kansas City; and these defendants show that an agent and attorney of the First National Bank of Kansas City, the consignee of said cattle, was notified on the date that the cattle arrived in Kansas City, by the J. P. Peters Commission Company, that the cattle had arrived; that they had been delivered to the J. P.

Peters Commission Company, but they had not yet been sold;
18 and that the said agent and attorney of the consignee assented to and acquiesced in the possession of the cattle by the J. P. Peters Commission Co. and the delivery of them to it, and that he did not object to the delivery to that company, nor demand the possession of the cattle, nor object to the J. P. Peters Commission Company handling same; and these defendants further show that after said cattle were sold by the J. P. Peters Commission Company the plaintiff herein, through its agent, the First National Bank of Kansas City, sought and endeavored to collect the City National Bank's draft for the advances on the cattle from the J. P. Peters Commission Company, and it was only after such efforts to collect failed that the plaintiff herein sued these defendants; and these defendants show that fifteen cars of the cattle were delivered at the pens, which are in Missouri, to the J. P. Peters Commission Company, and thirteen cars were delivered at the chutes, which are in Kansas, to the J. P. Peters Commission Company. That the foregoing facts constituted a ratification of the delivery made.

X.

The defendant, El Paso & Southwestern Railroad Company further shows that no notice in writing was given by the plaintiff of its claim for damages to any general officer, claim agent or station agent of the El Paso & Northeastern Railroad Company, or the El Paso & Southwestern Company within four months after October 30th, the date of the delivery of said cattle, as the special contract entered into provided should be a condition precedent to recovery. It shows that the limitation mentioned is just and reasonable and does not exempt their responsibility due to negligence and, therefore, it says that in no event can any recovery be had against it; that this was an interstate shipment governed and controlled by the Interstate Commerce Act of The United States; that under said Act the right, privilege and immunity is given this defendant of providing in special contracts for a reasonable and just notice as condition precedent to recovery, and such right, privilege and immunity, as well as all other rights, privileges and immunities given these defendants, or any of them, under said Interstate Commerce Act of the United States are here now pleaded and relied upon.

XI.

These defendants further show: That the contract entered into at Tucuman by plaintiff (through Lester Hunt, its agent) with the Chicago, Rock Island & El Paso Railway Company for transportation of the cattle to Kansas City, contained substantially the following provision:

"Fourth. That the second party (City National Bank) shall assume all risk and expense of feeding, watering, bedding and otherwise caring for the live stock covered by this contract while in cars, yards, pens or elsewhere, and shall load and unload the same at his own expense and risk." And said contract provided further for the agents of the plaintiff, to-wit: Lester Hunt and two others to accompany said shipment and care for said cattle on behalf of the plaintiff.

That said agents of plaintiff were with said cattle when they reached Kansas City, knew that they had reached their destination and were there to be delivered to the J. P. Peters Commission Company.

That the provision in said contract that plaintiff should unload said cattle at its own risk and expense was a just and reasonable one which does not exempt defendant from the results of its own negligence, and is valid and enforceable; and thereby the plaintiff's said agents in charge of said cattle were charged with the duty of superintending and assisting the stock yards employees who unloaded, as defendants are informants charge on information and belief, did superintend and assist in said unloading.

That by reason of the premises, the plaintiff and its consignor, First National Bank of Kansas City, had both actual notice and knowledge and constructive notice that the cattle had arrived, that

they were to be delivered to J. P. Peters Commission Company and that they were delivered to that Company.

And, thereby, defendants were exonerated from any duty of further notice to said First National Bank of Kansas City.

XII.

These defendants further show that upon arrival at Kansas City, fifteen cars of the cattle were by the defendants shunted to the pens which are in Missouri and thirteen cars were shunted to the chutes which are in Kansas, which said handling of the cattle was with the knowledge, authorization and, as defendants are informed and
21 allege, upon the direction of plaintiff's agents in charge of and accompanying said cattle; that by the clause in said contract adverted to in the last preceding paragraph of this answer, it became the duty of the plaintiff, through its agents and employes, to unload said cattle and, as defendants are informed and believe, said cattle were unloaded under the direction and superintendence of plaintiff's said agents accompanying said cattle; and, in any event, under the provision of said contract adverted to, the stock yard employes who unload, as defendants are informed and believe, the said cattle were acting as and in the capacity of agents for plaintiff, and their possession was in legal effect the possession of the plaintiff and the delivery to J. P. Peters Commission Company was thereby authorized, directed and ratified by the plaintiff in this case.

XIII.

These defendants show that the cattle involved in this case were purchased in Mexico by one John Cameron in pursuance of and as authorized by financial and business relations between the said John Cameron and J. P. Peters Commission Company and the City National Bank of El Paso, Texas; that the advances made against said cattle by the City National Bank of El Paso, Texas, originally amounted to Fifteen Thousand Eight Hundred One and 18/100 (\$15,801.18) Dollars; that the said sum Fifty-eight Hundred (\$5,800.00) Dollars was repaid to the City National Bank by the parties to whom the cattle were delivered the J. P. Peters Commission Company, leaving a balance of Ten Thousand One and 18/100 (\$10,001.18) Dollars, for which, with additional expense
22 charges, the plaintiff sues. That subsequent to the bringing of this suit the plaintiff, City National Bank, as these defendants are informed and believe, has endeavored to collect the balance so due on said cattle from the J. P. Peters Commission Company and from the said John Cameron; and these defendants are informed and believe and charge the fact to be that subsequent to the bringing of this suit the said John Cameron and J. A. Peters and J. P. Peters and the Peters Commission Company, assenting to the plaintiff's contention that by reason of the said financial relations between the said three parties named they are liable for said unpaid advances against said cattle, have repaid, or in writing secured and arrange

for the repayment of said Ten Thousand (\$10,000.00) Dollars to the City National Bank of El Paso, Texas, the exact method of said repayment by the said parties to the City National Bank of El Paso, Texas, being unknown to these defendants, but they allege and charge that the obligation to repay said sum is in writing evidenced by a written agreement entered into by plaintiff and John Cameron, and a note and mortgage entered into by J. A. or J. P. Peters, and plaintiff is notified to produce said writings or secondary evidence of their contents will be adduced; and that thereby the cause of action of the said City National Bank, if any it ever had, has been satisfied, paid off and settled to the extent of said moneys so repaid and secured to be repaid to it by the John Cameron and J. A. and J. P. Peters, and to that extent there is, in any event, no cause of action against these defendants; or in any event, these defendants allege that the

23 said plaintiff was not at the time when the said cattle were so shipped, nor at any time, the owner of the same, nor did they have any interest in the same, except, only, that they had advanced to the actual owners of said cattle, or some of them, certain sums of money to be applied, and which, these defendants are advised, was applied towards the purchase of said cattle or the expense of bringing the same from Mexico where they were purchased to the City of El Paso, of here caring for and transporting and delivering the same to Kansas City, Missouri, and in order to secure the repayment to it of the sums of money so advanced, had required that the said cattle be consigned to it at El Paso, Texas, or had taken possession of the same and had caused the same to be transported to Kansas City; and these defendants allege that all of the sums of money which the said plaintiff had so advanced has long since been paid to the said plaintiff either in cash, by notes or otherwise, or, if these defendants are mistaken in this, then they allege that a large portion of the same has been so paid and that the payment of the balances has been secured by the owners of said cattle, or some of them, or by someone else at the instance of said owners, and that said plaintiff has accepted said payments and the said security for the payment of the balance, if any, in settlement and satisfaction of its claim against the parties to whom it advanced said sums of money and against whom it had a legal claim for the amounts so advanced.

XIV.

These defendants deny that the plaintiff has been damaged in any sum occasioned by any wrongful or negligent act upon the part of of them, or either of them.

24 Wherefore, they pray that the plaintiff take nothing as against them, or either of them, and that they go hence without day and recover their costs.

HAWKINS & FRANKLIN,
W. M. PETICOLAS,
Attorneys for Defendants.

THE STATE OF TEXAS,
County of El Paso:

E. F. Anderson, being duly sworn, on oath deposes that he has read the foregoing answer; that the facts therein stated are true, save where stated on information and belief, and those he believes to be true.

E. F. ANDERSON.

Sworn to and subscribed before me this 22nd day of April A. D. 1919.

[Not'l Seal.]

GLADYS SINCOMB,

Notary Public in and for El Paso County, Texas.

(Endorsed:) No. 9181. In Dist. Court, 41st Jud. Dist. El Paso Co. Texas. City National Bank vs. E. P. & S. W. Co. et al. Defendant's 1st Amended Answer. Filed this 8th day of September, A. D. 1919. C. M. McKinney, Clerk District Court, El Paso Co., Texas. E. M. Montes, Deputy.

In the District Court of El Paso County, Texas, 41st Judicial District.

No. 9181.

CITY NATIONAL BANK

VS.

EL PASO & SOUTHWESTERN COMPANY et als.

Answer of Plaintiff to Defendants' First Amended Answer.

Filed Sep. 8, 1919.

25 Comes now the plaintiff, and for answer to the defendants' first amended original answer filed herein says:

1st. That said amended original answer in the manner and form therein alleged is insufficient in law to constitute any defense to plaintiff's cause of action as contained in its first amended original petition on file herein, and of this it prays the judgment of the court.

2nd. This plaintiff denies each and every allegation in said first amended answer of said defendants, and of this it puts itself upon the country.

3rd. Specially answering the matters and things set forth in Paragraph 3 of defendants' first amended original answer, wherein the defendants the El Paso & Southwestern Company, the El Paso & Northeastern Railway Company, the El Paso & Northeastern Railroad Company, and the Chicago, Rock Island & El Paso Railway

Company enter a plea of the Statute of Limitation of two years, plaintiff alleges that on the 27th day of November, 1911, the defendants the El Paso & Northeastern Railroad Company and the El Paso & Southwestern Company, and as alleged in plaintiff's first amended original petition on file herein, agreed in writing to transport for plaintiff as consignor the cattle mentioned in plaintiff's said amended petition, from El Paso, Texas, to Kansas City, State of Missouri, which said contract as well as the shipment covering the same, was by reason thereof as interstate shipment from El Paso, Texas, to Kansas City, State of Missouri; that said cattle were delivered by plaintiff by virtue of said contract as aforesaid, to the defendant the El Paso & Southwestern Company as the receiving carrier to be transported by the said receiving carrier to the several connecting carriers, and being the several defendants herein, for final and ultimate interstate delivery at Kansas City, State of Missouri, said cattle being received in fact by the El Paso & Southwestern Company, defendant, and thereafter to be transported by it over its line of railroad and that of its connecting carriers and being defendants herein; that in fact said cattle were ultimately received by and transported by the defendant Chicago, Rock Island & Pacific Railway Company to Kansas City, Missouri, and the defendant the Chicago, Rock Island & Pacific Railway Company was in fact the delivering carrier and the last carrier handling said live stock when delivered in Kansas City, Missouri, to the J. P. Peters Commission Company, and were never in fact delivered by the delivering carrier the Chicago, Rock Island & Pacific Railway Company, to this plaintiff, the consignor, or to the First National Bank of Kansas City, Missouri, the consignee, or to any other person or corporation authorized by the consignor or the consignee by the terms of said contract to receive delivery thereof.

That plaintiff instituted suit on its cause of action against the El Paso & Northeastern Railroad Company, the El Paso & Southwestern Company, the Chicago, Rock Island & Gulf Railway Company, and the Chicago, Rock Island & Pacific Railway Company on February 20, 1912, and within less than four months after plaintiff had learned of the misdelivery of said cattle, or the accrual of its cause of action against the defendants, and the said last named defendants were in fact served with legal citation growing out of said suit by delivering copies of said citation containing a substantial statement of plaintiff's said suit and its claim for damages, which said citation were served upon the duly authorized claim agent and station agent of each of said last named defendants, on the 20th and 21st days of February, 1912, said dates being within four months from the time of the accrual of plaintiff's said cause of action, and which said citation so delivered to said agents of said named defendants were in writing.

Plaintiff further represents that within four months from the time it learned or could have learned of the misdelivery of said cattle or of the accrual of its cause of action against said defendants, the said defendants last above mentioned entered their appearance in the suit filed by plaintiff herein against said defendants, and filed an

answer to plaintiff's said suit, which said suit is shown in its original petition on file in this cause, and which was answered by said defendants within said four months, as aforesaid, by a full and complete statement of plaintiff's cause of action, as well as its loss and damages sustained by it because of the misdelivery of said cattle by defendants and the conversion of same by said defendants.

Plaintiff further alleges that there was in fact a notice of plaintiff's said claim, as well as said suit, against the defendant the El Paso & Southwestern Company, delivered to the said El Paso & Southwestern Company on the 20th day of February, 1912, when

28 a written notice was delivered to W. S. Dawson and R. R. Seeds, the duly authorized local and station agents of the said defendant the El Paso & Southwestern Company, which deliveries of said notice were made within four months from the time of the accrual of plaintiff's said cause of action.

This plaintiff further alleges that a short time after plaintiff's cause of action accrued, and within less than four months from the accrual thereof, said plaintiff negotiated with the general officers of the defendants, which said general officers then resided in and had charge of the general business of said defendants in El Paso, Texas, which said negotiations were carried on by said general officers for and on behalf of the defendants for the purpose of adjusting the subject matter of this court. Many and constant negotiations were had with said general officers on behalf of the defendants for the purpose of adjusting said cause of action, during which time said general officers were fully aware of and informed of plaintiff's said claim for damages and its said loss, and said general officers led this plaintiff to believe by their actions in said negotiations with plaintiff that no other or additional notice or claim for damages was necessary or desired; and that plaintiff alleges that in truth and in fact the general officers of the said defendants did have actual knowledge within said four months of plaintiff's said claim, by reason whereof the said defendants have waived any other notice, as herein alleged, and are estopped from pleading in bar plaintiff's said suit the condition contained in said bill of lading for written notice of plaintiff's said claim.

29 Plaintiff further alleges, without waiving any matters hereinbefore alleged, that under the terms of said contract, and particularly the paragraph relied upon in said bill of lading as set forth in paragraph 5 of the defendants' amended answer, that it was not necessary for plaintiff to have given the defendants any notice in writing of its claim for damages for the reason that this suit is based upon a cause of action growing out of misdelivery of said cattle, and is a suit for conversion of cattle that were never delivered by the defendants to this plaintiff or the consignee, or anyone authorized by said consignor or the consignee.

That the defendants having converted said cattle abandoned said contract containing said provision of notice as set forth in paragraph 5 of the defendants' amended answer, and said defendants cannot now claim any right, interest or benefit from said answer, and more particularly said Paragraph 5.

Plaintiff further alleges that said Paragraph 5 providing notice within four months as alleged by the defendants, is unreasonable, unjust and against public policy and is contrary to the laws and statutes and decisions of the State of Texas and of the several courts, and is therefore null and void, and this plaintiff here now pleads the nullity of said provision.

Wherefore, the premises considered, and all parties being in court, plaintiff asks for judgment for its damages, as contained in its first amended original petition filed herein on December 24, 1914.

DYER, CROOM & JONES,
Attorneys for Plaintiff.

30 (Endorsed:) No. 9181. In the 41st District Court of El Paso County, Texas. City National Bank vs. El Paso & Southwestern Co., et als. Answer of Plaintiff to Defendants' First Amended Original Answer. Filed September 8, 1919. C. M. McKinney, Clerk District Court, El Paso County, Texas, By E. M. Montes, Deputy.

In the District Court of El Paso County, Texas, 41st Judicial District, September Term, A. D. 1919.

No. 9181.

THE CITY NATIONAL BANK OF EL PASO, TEXAS,

vs.

THE EL PASO & NORTHEASTERN R. R. Co et al.

Plaintiff's Trial Amendment.

Filed Sept. 10, 1919.

Comes now herein plaintiff and files this its trial amendment, and supplemental petition in answer to the amended answer of the defendants, and shows that the defendants issued and delivered the bill of lading of date October 27th, 1911, and introduced in evidence herein, and covering the shipment of cattle involved herein, without inserting in said bill of lading that the consignee should be the First National Bank of Kansas City, Mo., care of J. P. Peters Commission Company. That it was through negligence, carelessness, omission and fault of defendants in permitting said bill of lading to be so issued and delivered to plaintiff herein without giving notice to it or advising it that there had been directions or instructions by J. A. Peters to bill or ship the cattle to the First National Bank of Kansas City care of J. P. Peters Commission Company and had said bill of lading contained said directions plaintiff would not have accepted the same but accepted and received said bill of lading and relied thereon without notice of said intentions and relied on the same and had said bill of lading contained said directions so
31 alleged to have been given by said Peters said plaintiff would have

notified said defendants not to deliver said cattle to said Peters Co. and by reason of their conduct and act in putting into circulation, issuing and delivering, and permitting to be issued to this plaintiff said bill of lading without said instructions care Peters & Co. thereon said defendants are estopped to deny same, its effect or its validity, or to set up any undertaking or agreement with said J. A. Peters.

DYER, CROOM & JONES,
Attorneys for Plaintiff, City National Bank.

(Endorsed:) No. 9181. City National Bank vs. E. P. & S. W. Ry. Co. et als. Plaintiff's Trial Amendment. Filed this 10th day of Sept. A. D. 1919. C. M. McKinney, Clerk District Court, El Paso Co., Texas. E. M. Montes, Deputy.

In the District Court of El Paso County, Texas, 41st Judicial District,
September Term, A. D. 1919.

No. 9181.

THE CITY NATIONAL BANK OF EL PASO, TEXAS,

vs.

EL PASO & NORTHEASTERN RAILROAD Co. et al.

Charge of the Court.

Filed Sept. 10, 1919.

GENTLEMEN OF THE JURY:

You are instructed that you are the exclusive judges of the facts proven, the credibility of the witnesses, and the weight to be given to their testimony, but you are not the judges of the law. The
32 law in this case you will take from this charge and the special or supplemental charges, if any, given you in connection herewith.

This case will be submitted to you on special issues, and you will be governed in your findings thereof by the facts and circumstances in evidence, basing your findings upon the preponderance of the evidence as directed by the Court. Your verdict will be signed by your foreman, and will consist of your finding upon the issues submitted.

There will be handed you herewith a form of a verdict which you may use, if you so desire.

Question Number One.—Do you find from the evidence, by a preponderance thereof, that contemporaneous with, or just prior to the execution and delivery of the bill of lading covering the shipment of cattle in question in this suit, it was mutually agreed by and between J. A. Peters, acting for the City National Bank, and the agent of the receiving carrier at El Paso, Texas, that such cattle should be consigned by the bill of lading to the First National Bank of Kansas

City, Missouri, care of the J. P. Peters Commission Company. Answer yes or no.

In this connection you are instructed that an agreement is one of the constituent elements of a contract, and in order that such agreement exist the minds of the parties must meet as to the terms thereof. An agreement may arise from words spoken, or the acts and conduct of the parties, or from words spoken, taken in connection with the acts and conduct of the parties.

33 If you have answered question number one in the affirmative then, but not otherwise, answer in connection therewith this additional question.

Question Number Two.—Do you find from the evidence, by a preponderance thereof, that when the bill of lading covering the shipment of cattle in question was issued that the same, by the mutual mistake of J. A. Peters, acting on behalf of the City National Bank, and the said agent of the defendant carriers acting in their behalf, omitted to state in the bill of lading in accordance with their mutual agreement, that the cattle were consigned to the First National Bank care of the J. P. Peters Commission Company, if such agreement there was? Answer yes or no.

In connection with this question you are instructed that in order for a mistake to be mutual, both parties must be laboring under a mistaken belief that the omitted term of the agreement, if any, was incorporated in the writing, and both mutually intend that it should be so incorporated in the writing.

Question Number Three.—Do you find from the evidence, by a preponderance thereof, that J. A. Peters, directed the agent of the defendant carriers receiving the cattle at El Paso, shipment of which is in question, to place on the way-bill that the cattle were consigned to the First National Bank of Kansas City in care of the J. P. Peters Commission Company? Answer yes.

Question Number Four.—Do you find from the evidence by a preponderance thereof, that in the case of the shipments of cattle
34 made prior to the shipment in question, said prior shipments consigned by bills of lading by the City National Bank of El Paso, Texas, to the First National Bank of Kansas City, that the delivering defendant carrier delivered same to the J. P. Peters Commission Company, at Kansas City, prior to the payment of the drafts drawn *drawn* on the Peters Commission Company attached to the bills of lading? Answer yes or no.

If you answer question No. four in the affirmative, then, but not otherwise, answer this question:

Question Number Five.—Do you find from the evidence, by a preponderance thereof, that in cases of prior shipments of cattle inquired about in question Number four, that the said First National Bank had notice prior to the arrival of the shipments in question herein, that the delivering carrier had delivered such prior shipments or

some of same to the Peters Commission Company prior to the payment of the drafts drawn on the said Peters Commission Company for such prior shipments, if any if they had been delivered prior to the payment of the drafts, and said bank ratified and acquiesced therein? Answer yes or no.

Question Number Six.—Do you find from the evidence, by a preponderance thereof, that in reliance upon the ratification or acquiescence of the First National Bank of Kansas City, in the delivery of said prior shipments of cattle to J. P. Peters Commission Company before the payment of the drafts attached to the bills of lading, if said shipments had been delivered prior to the payment of the drafts, and the said bank did ratify or acquiesce therein, that the delivering defendant delivered the shipment of cattle in question in this suit to the J. P. Peters Commission Company without the payment of the draft attached to the bill of lading? Answer yes or no.

Question Number Seven.—Do you find from the evidence, by a preponderance thereof, that the acquiescence or ratification of the First National Bank of the delivery of prior shipments before payment of the drafts attached to the bills of lading, if prior shipments were so delivered and the First National Bank acquiesced and ratified same, was reasonably sufficient to induce the belief on the part of the agent of delivering defendant carrier that said J. P. Peters Commission Company was duly authorized to receive said cattle for the First National Bank of Kansas City.

P. R. PRICE,

Judge.

(Endorsed:) No. 9181. City National Bank of El Paso, Texas, vs. The El Paso & Northeastern Ry. Co. et al. Charge of the Court Filed Sep. 10, 1919. C. M. McKinney, District Clerk.

In the District Court of El Paso County, Texas, 41st Judicial District, September Term, A. D. 1919.

No. 9181.

THE CITY NATIONAL BANK OF EL PASO, TEXAS,

vs.

THE EL PASO & NORTHEASTERN R. R. CO. et al.

Plaintiff's Instruction No. 3.

Filed Sept. 10, 1919.

Instruction No. 3 Requested by Plaintiff.

36 GENTLEMEN OF THE JURY:

Do you find from the evidence by a preponderance thereof, that the plaintiff, City National Bank, on receipt of the bill of lading in

question in this suit, relied on same as expressing the true contract between the parties, and were without notice that the way bill directed that the cattle be delivered to the First National Bank care of the J. P. Peters Commission Company. Answer yes or no.

DYER, CROOM & JONES,
Attys. for Plff.

Refused.

P. R. PRICE, *Judge.*

(Endorsed:) 9181. No. 3. Filed Sep. 10, 1919. C. M. McKinney, District Clerk.

Instruction No. 4 by Court.

Filed Sep. 10, 1919.

Requested Instruction No. 4.

Do you find from the evidence, by a preponderance thereof, that had such bill of lading recited that the cattle were to be delivered to the First National Bank care of the J. P. Peters Commission Company, that plaintiff could and would have notified the defendants, prior to the delivery to the J. P. Peters Commission Company not to deliver said cattle without the payment of the draft in the First National Bank of Kansas City? Answer yes or no.

P. R. PRICE,
Judge.

City National Bank of El Paso.

(Endorsed:) 9181. City Nat. Bank of El Paso, Texas, vs. El Paso & N. E. Ry Co. et al. Requested Ins. No. 4. Filed Sept. 10, 1919. C. M. McKinney, District Clerk.

37 In the District Court of El Paso County, Texas, 41st Judicial District, September Term, A. D. 1919.

No. 9181.

THE CITY NATIONAL BANK OF EL PASO, TEXAS,
VS.

EL PASO & NORTHEASTERN RAILROAD Co. et al.

Verdict.

Filed Sep. 11, 1919.

We the jury in the above styled and numbered cause return the following answers to the issues submitted to us as our verdict:

Question Number One. Do you find from the evidence, by a preponderance thereof, that contemporaneous with, or just prior to the execution and delivery of the bill of lading covering the shipment of

cattle in question in this suit, it was mutually agreed by and between J. A. Peters, acting for The City National Bank, and the agent of the receiving carrier at El Paso, Texas, that such cattle should be consigned by the bill of lading to the First National Bank of Kansas City, Missouri, care of the J. P. Peters Commission Company?

Answer. Yes.

Question Number Two. Do you find from the evidence by a preponderance thereof, that when the bill of lading covering the shipment of cattle in question was issued that the same, by the mutual mistake of J. A. Peters, acting on behalf of the City National Bank, and the said agent of the defendant carriers acting in their behalf, omitted to state in the bill of lading in accordance with their mutual agreement, that the cattle — consigned to the First National Bank of the J. P. Peters Commission Company, if such agreement there was?

Answer. Yes.

38 Question Number Three. Do you find from the evidence, by a preponderance thereof, that J. A. Peters, directed the agent of the defendant carriers receiving the cattle at El Paso, shipment of which is in question, to place on the way-bill that the cattle were consigned to the First National Bank of Kansas City in care of the J. P. Peters Commission Company?

Answer. Yes.

Supplemental Question by Court. Was such direction on the part of J. A. Peters to said agent, if you have found he gave such direction, prior to, contemporaneous with or subsequent to the execution and delivery of the bills of lading covering this shipment of cattle.

Answer. Contemporaneous with.

Question Number Four. Do you find from the evidence by a preponderance thereof, that in the case of the shipments of cattle made prior to the shipment in question, said prior shipments consigned by bills of lading by the City National Bank of El Paso, Texas, to the First National Bank of Kansas City, that the delivering carrier delivered same to the J. P. Peters Commission Company at Kansas City, prior to the payment of the drafts drawn on the Peters Commission Company attached to the bills of lading.

Answer. Yes.

Question Number Five. Do you find from the evidence, by a preponderance thereof, that in cases of prior shipments of cattle inquired about in question Number Four, that the said First

39 National Bank had notice prior to the arrival of the shipment in question herein, that the delivering carrier had delivered such prior shipments or some of same to the Peters Commission Company prior to the payment of the drafts drawn on the said Peters Commission Company for such prior shipments, if any, of them had been delivered prior to the payment of the drafts, and said bank ratified and acquiesced therein?

Answer. Yes.

Question Number Six. Do you find from the evidence, by a preponderance thereof, that in reliance upon the ratification or acquiescence of the First National Bank of Kansas City in the delivery of said prior shipments of cattle to J. P. Peters Commission Company

before the payment of the draft attached to the bills of lading, if said shipments had been delivered prior to the payment of the drafts, and the said bank did ratify or acquiesce therein, that the delivering se- — defendant delivered the shipment of cattle in question in this suit to the J. P. Peters Commission Company without the payment of the draft attached to the Bill of lading?

Answer. Yes.

Question Number Seven. Do you find from the evidence, by a preponderance thereof, that the acquiescence or ratification of the First National Bank of the delivery of prior shipments before payment of the drafts attached to the Bills of lading, if prior shipments were so delivered and the First National Bank acquiesced and ratified same, was reasonably sufficient to induce the belief on the
40 part of the agent of delivering defendant carrier that said J. P. Peters Commission Company was duly authorized to receive said cattle for the First National Bank of Kansas City?

Answer. Yes.

Question Number Four Requested by Plaintiff. Do you find from the evidence, by a preponderance thereof, that had such bill of lading recited that the cattle were to be delivered to the First National Bank care of the J. P. Peters Commission Company, that plaintiff could and would have notified the defendants, prior to the delivery to the J. P. Peters Commission Company, not to deliver said cattle without the payment of the draft in the First National Bank of Kansas City?

Answer. No.

P. W. STILL, *Foreman*.

(Endorsed:) 9181. City Nat'l Bank vs. E. P. & N. E. Ry. et al. Verdict. Filed Sep. 11, 1919. C. M. McKinney, District Clerk.

In the District Court of El Paso County, Texas, 41st Judicial District, September Term A. D. 1919.

No. 9181.

THE CITY NATIONAL BANK OF EL PASO, TEXAS,
vs.

EL PASO & NORTHEASTERN RAILROAD CO. et al.

Defendants' Motion for Judgment.

Filed Sep. 11, 1919.

Now come the defendants and move the Court to enter judgment
41 for defendants herein, upon the findings of the jury, returned into open court on September 10, 1919, on special issues therefore submitted by the Court to said jury.

W. M. PETICOLAS,

DEL W. HARRINGTON.

Attorneys for Defendants.

(Endorsed:) No. 9181. The City Nat'l Bank vs. El Paso & Northeastern Railroad Co. et al.: -Defts.' Motion for Judgment. Filed this 11th day of September, A. D. 1919. C. M. McKinney, Clerk District Court, El Paso Co., Texas, E. M. Montes, Deputy.

In the District Court of El Paso County, Texas, 41st Judicial District, September Term, A. D. 1919.

No. 9181.

THE CITY NATIONAL BANK OF EL PASO, TEXAS,

VS.

EL PASO & SOUTHWESTERN RAILROAD CO. et al.

Judgment. Bk. 14 pg.

Be it remembered that on the 8th day of September, 1919, the above numbered and entitled cause came regularly on for trial and all parties, plaintiff and defendants, appeared by counsel and announce ready for trial, whereupon a jury of good and lawful men, to-wit: P. W. Still and eleven others, were duly empaneled and sworn, and after hearing the evidence and receiving the charge of the Court, and hearing argument of counsel, retired to consider of their verdict, and thereafter, to-wit: on the 10th day of September, 1919, returned into Court the special issues which had been submitted to them by the Court, with answers thereto as follows:

We, the jury in the above styled and numbered cause return the following answers to the issues submitted to us as our verdict.

42 Question Number One. Do you find from the evidence, by a preponderance thereof, that contemporaneous with, or just prior to the execution and delivery of the bill of lading covering the shipment of cattle in question in this suit, it was mutually agreed by and between J. A. Peters, acting for the City National Bank, and the agent of the receiving carrier at El Paso, Texas, that such cattle should be consigned by the bill of lading to the First National Bank of Kansas City, Missouri, care of the J. P. Peters Commission Company?

Answer. Yes.

Question Number Two. Do you find from the evidence, by a preponderance thereof, that when the bill of lading covering the shipment of cattle in question was issued that the same, by the mutual mistake of J. A. Peters, acting on behalf of the City National Bank, and the said agent of the defendant carriers acting in their behalf, omitted to state in the bill of lading in accordance with their mutual agreement, that the cattle were consigned to the First National Bank care of the J. P. Peters Commission Company, if such agreement there was?

Answer. Yes.

Question Number Three. Do you find from the evidence, by a preponderance thereof, that J. A. Peters, directed the agent of the de-

defendant carriers receiving the cattle at El Paso, shipment of which is in question, to place on the way-bill that the cattle were consigned to the First National Bank of Kansas City in care of the J. P. Peters Commission Company?

Answer. Yes.

43 Supplemental Question by Court. Was such direction on the part of J. A. Peters to said agent, if you have found he gave such direction, prior to, contemporaneous with, or subsequent to the execution and delivery of the bill of lading covering this shipment of cattle?

Answer. Contemporaneous with.

Question Number Four. Do you find from the evidence, by a preponderance thereof, that in the case of the shipment in question, said prior shipments consigned by bills of lading by the City National Bank of El Paso, Texas, to the First National Bank of Kansas City, that the delivering carrier delivered same to the J. P. Peters Commission Company at Kansas City, prior to the payment of the drafts drawn on the Peters Commission Company attached to the bills of lading?

Answer. Yes.

Question Number Five. Do you find from the evidence, by a preponderance thereof, that in cases of prior shipments of cattle inquired about in question Number Four, that the said First National Bank had notice prior to the arrival of the shipment in question herein, that the delivering carrier had delivered such prior shipments or some of same to the Peters Commission Company prior to the payment of drafts drawn on said Peters Commission Company for such prior shipments, if any, of them had been delivered prior to the payment of the payment of the drafts, and said bank ratified and acquiesced therein?

Answer. Yes.

44 Question Number Six. Do you find from the evidence, by a preponderance thereof, that in reliance upon the ratification of the First National Bank of Kansas City in the delivery of said prior shipments of cattle to J. P. Peters Commission Company before the payment of the drafts attached to the bills of lading, if said shipments had been delivered prior to the payment of the drafts, and said bank did ratify or acquiesce therein, that the delivering defendant delivered the shipment of cattle in question in this suit to the J. P. Peters Commission Company without the payment of the draft attached to the bill of lading?

Answer. Yes.

Question Number Seven. Do you find from the evidence, by a preponderance thereof, that the acquiescence or ratification of the First National Bank of the delivery of prior shipments before payment of the drafts attached to the bills of lading if prior shipments were so delivered and the First National Bank acquiesced and ratified same, was reasonably sufficient to induce the belief on the part of the agent of delivering defendant carrier that said J. P. Peters Commission Company was duly authorized to receive said cattle for the First National Bank of Kansas City?

Answer. Yes.

Question Number Four Requested by Plaintiff. Do you find from the evidence, by a preponderance thereof, that had such bill of lading recited that the cattle were to be delivered to the First National Bank care of the J. P. Peters Commission Company that plaintiff would have notified the defendants, prior to the delivery to the J. P. Peters Commission Company, not to deliver said cattle without the payment of the draft in the First National Bank of Kansas City?

Answer. No.

P. W. STILL,
Foreman.

Wherefore, upon such findings of the jury as aforesaid, the Court is of the opinion that the plaintiff is not entitled to recover herein, and it is therefore considered, ordered, adjudged and decreed by the Court that the City National Bank of El Paso, Texas, take nothing by its suit against the defendants, nor any of them, and that the defendants, El Paso & Southwestern Company, El Paso & Northeastern Company, El Paso & Northeastern Railway Company, El Paso & Rock Island Railway Company, Chicago, Rock Island & El Paso Railway Company, Chicago, Rock Island & Gulf Railway Company, and Chicago, Rock Island & Pacific Railway Company be, and each and all of said defendants are hereby discharged with their costs, and that they go hence without day.

It is further considered, ordered and adjudged by the Court that all of the costs in this suit be taxed against the plaintiff, City National Bank of El Paso, Texas, and that the said named defendants and each of them and the officers of this court have their execution for costs.

46 In the District Court of El Paso County, Texas, 41st Judicial District, September Term, A. D. 1919.

No. 9181.

THE CITY NATIONAL BANK OF EL PASO, TEXAS,

vs.

THE EL PASO & NORTHEASTERN RAILROAD CO. et al.

Supplemental Charge of the Court.

Filed Sept. 10, 1919.

Supplemental Charge Given by the Court.

GENTLEMEN OF THE JURY:

If you answer question Number three in the affirmative, then answer this additional question:

Was such direction on the part of J. A. Peters to said agent, if you have found he gave such direction, prior to, contemporaneous with, or subsequent to the execution and delivery of the bills of lading covering this shipment of cattle?

In connection with this question you are instructed that you will answer same by the use of the words "Prior to," or or "Contemporaneous with," or "subsequent to" as you find the facts to be from the evidence.

P. R. PRICE,
Judge.

(Endorsed:) 9181. City Nat'l Bank of El Paso, Texas, vs. The El Paso & N. E. Ry. Co. et al. Supplemental Charge of the Court. Filed Sep. 10, 1919. C. M. McKinney, District Clerk.

In the District Court of El Paso County, Texas, 41st Judicial District, September Term, 1919.

No. 9181.

THE CITY NATIONAL BANK OF EL PASO, TEXAS, Plaintiff,

vs.

EL PASO & NORTHEASTERN RAILROAD Co. et al., Defendants.

47 *Motion of the Plaintiff to Set Aside Findings of the Jury to Special Question Submitted by the Court to the Jury.*

Filed Sep. 11, 1919.

Comes now the plaintiff in the above entitled and numbered cause, and moves the Court to set aside the findings of the jury in answer to the special questions submitted by the Court to the jury on the trial of said cause on the 10th day of September, A. D. 1919, for the following reasons:

1. That the jury's answer of "Yes" to Question No. 1 propounded by the Court is unsupported by the evidence and is contrary to the great preponderance of the evidence and the manifest weight of the testimony.

2. That the jury's answer of "Yes" to question No. 2 propounded by the Court is unsupported by the evidence and is contrary to the great preponderance of the evidence and the manifest weight of the testimony.

4. That the jury's answer of "Yes" to Question No. 4 propounded by the Court is unsupported by the evidence and is contrary to the great preponderance of the evidence and the manifest weight of the testimony.

5. That the jury's answer of "Yes" to Question No. 5 propounded by the Court is unsupported by the evidence and is contrary to the

great preponderance of the evidence and the manifest weight of the testimony.

6. That the jury's answer of "Yes" to question No. 6 propounded by the Court is unsupported by the evidence and is contrary to the great preponderance of the evidence and the manifest weight of the testimony.

48 No. 7. That the jury's answer of "Yes" to question No. 7 propounded by the Court is unsupported by the evidence and is contrary to the great preponderance of the evidence and the manifest weight of the testimony.

That the jury's answer of "No" to Question No. 4 requested by the plaintiff is unsupported by the evidence and is contrary to the great preponderance of the evidence and the manifest weight of the testimony.

Whereof, the premises considered, and by reason of the above, plaintiff moves the Court to set aside each and all of the findings of the jury on the questions propounded to said jury by the Court as aforesaid.

DYER, CROOM & JONES,
Attorneys for Plaintiff.

(Endorsed:) No. 9181. In the 41st District Court of El Paso County, Texas, September Term, 1919. The City National Bank of El Paso, Texas v. El Paso & Northeastern Railroad Company, et als. Motion of the Plaintiff to set aside findings of the jury to Special Questions submitted by the Court to the jury. Filed Sep. 11, 1919. C. M. McKinney, District Clerk.

In the District Court of El Paso County, Texas, 41st Judicial District, September Term, 1919.

No. 9181.

THE CITY NATIONAL BANK OF EL PASO, TEXAS, Plaintiff,

vs.

EL PASO & NORTHEASTERN RAILROAD CO.

Plaintiff's Motion for Judgment.

Filed Sep. 11, 1919.

49 Now comes the Plaintiff in the above entitled and numbered cause, and by virtue of the evidence and the law governing the facts in this case, moves the Court to enter judgment in favor of plaintiff for the amount sued on, together with interest thereon from November 1, 1911, at six per cent per annum, and all costs of suit.

DYER, CROOM & JONES,
Attorneys for Plaintiff.

(Endorsed:) No. 9181. In the 41st District Court of El Paso County, Texas, September Term, 1919. The City National Bank of El Paso, Texas, v. El Paso & Northeastern Railroad Company, et al. Motion of the Plaintiff for Judgment. Filed Sep. 11, 1919. C. M. McKinney, District Clerk.

In the District Court of El Paso County, Texas, 41st Judicial District, September Term, 1919.

No. 9181.

THE CITY NATIONAL BANK OF EL PASO, TEXAS, Plaintiff,

vs.

EL PASO & NORTHEASTERN RAILROAD COMPANY et al., Defendants.

Plaintiff's Amended Motion for New Trial.

Filed — — —.

Now comes the plaintiff in the above cause and moves the Court to set aside the judgment heretofore rendered herein for the following reasons, to-wit:

1. That the Court erred in failing to grant plaintiff's special question No. 1 requesting the Court to instruct the jury to return a verdict in favor of plaintiff against the defendants the El Paso & Southwestern Railway Company, the El Paso & Northeastern Railway Company and the Chicago, Rock Island & Pacific Railway Company for the amount sued upon, because under the bill of lading covering the shipment of cattle involved in this suit, as well
50 as the undisputed evidence introduced in said cause, plaintiff was entitled to a judgment against said named defendants.

2. Because the Court erred in refusing to give plaintiff's special instruction No. 3 as follows: "Do you find from the evidence by a preponderance thereof, that the plaintiff, City National Bank, on receipt of the bill of lading in question in this suit, relied on same as expressing the true contract between the parties, and were without notice that the way bill directed that the cattle be delivered to the First National Bank care of the J. P. Peters Commission Company? Answer Yes or No.

4. The Court erred in refusing to grant plaintiff's motion for a judgment under the pleadings and the evidence and verdict of the jury, because the undisputed evidence introduced in said cause and the verdict of the jury entitled plaintiff to a judgment against the defendants for the amount sued for.

5. Because the Court erred in rendering judgment in favor of the defendants because under the pleadings and the bill of lading introduced in said cause covering the shipment involved, and the

introduced evidence and the findings of the jury show that the defendants were not entitled to a verdict in their favor.

6. Because the answer of the jury of "Yes" to Question No. 1 propounded by the Court is contrary to the manifest weight of the testimony and unsupported by the evidence introduced in said cause,

51 for the reason that all the evidence shows that contemporaneous with or just prior to the execution and delivery of the bill of lading covering the shipment of cattle, it was not mutually agreed between J. A. Peters, acting for plaintiff, and the agent of the receiving carrier, that such cattle should be consigned by bill of lading to the First National Bank at Kansas City, Missouri, care of the J. P. Peters Commission Company.

7. Because the answer of the jury of "Yes" to Question No. 2 propounded by the Court is contrary to the manifest weight of the testimony and unsupported by the evidence introduced in said cause, for the reason that all the evidence shows that when the bill of lading was issued that the same did not by mutual mistake of J. A. Peters and the agent of the defendant carrier omit to state in the bill of lading in accordance with their mutual agreement, that the cattle were consigned to the First National Bank care of J. P. Peters Commission Company.

8. Because the answer of the jury of "Yes" to Question No. 4 propounded by the Court is contrary to the manifest weight of the testimony and unsupported by the evidence introduced in said cause, for the reason that all the evidence showed that in case of shipments of cattle made prior to the shipment in question, said prior shipments were not delivered by the railroad to the J. P. Peters Commission Company prior to the payment of the drafts drawn on the Peters Commission Company attached to the bill of lading.

52 9. Because the answer of "Yes" of the jury to Question No. 5 propounded by the Court is contrary to the manifest weight of the testimony and unsupported by the evidence introduced in said cause, for the reason that there was no evidence showing or tending to show that the First National Bank had notice prior to the arrival of the shipment in question that the delivering carrier had delivered prior shipments, or some of them, to the Peters Commission Company prior to the payment of the drafts drawn on said Peters Commission Company for such prior shipments; or that said bank had ratified or acquiesced therein.

10. Because the answer of the jury of "Yes" to Question No. 6 propounded by the Court is contrary to the manifest weight of the testimony and unsupported by the evidence introduced in said cause, for the reason that there was no evidence showing or tending to show that the delivering carrier delivered the cattle in question to the J. P. Peters Commission Company in reliance upon the ratification or acquiescence of the First National Bank of Kansas City in the delivery of said prior shipments of cattle to the J. P.

Peters Commission Company before payments of drafts attached to bill of lading.

11. Because the answer of the jury of "Yes" to Question No. 7 propounded by the Court is contrary to the manifest weight of the testimony and unsupported by the evidence introduced in said cause, for the reason that there was no evidence showing or tending to show that the ratification or acquiescence of the First National Bank of the delivery of prior shipments before payment of drafts was reasonably sufficient to induce the belief on the part of the agent of the delivering carrier that the Peters Commission Company was duly authorized to receive said cattle for the First National Bank of Kansas City, Missouri.

12. Because the answer of the jury of "No" to Question No. 4 requested by plaintiff, is contrary to the manifest weight of the testimony and unsupported by the evidence introduced in said cause, for the reason that all the evidence showed that had such bill of lading recited that the cattle were to be delivered to the First National Bank care of the J. P. Peters Commission Company, that plaintiff could and would have notified the defendants, prior to the delivery of the cattle to the Peters Commission Company, not to deliver said cattle without the payment of draft in the first National Bank of Kansas City.

13. Because the Court erred in permitting the following question and answer by the defendants' witness J. A. Peters: "Who on behalf of the City National Bank saw to the making of the contract and the waybills under which they moved from El Paso to Kansas City——?" to which the witness answered: "I signed all the contracts and looked after that, and all the shipments we have." for the reason that the contract, bill of lading is one thing and the waybill is the railroads' guidance, which objection, as aforesaid, was then and there urged by the plaintiff and overruled by the Court.

14. Because the Court erred in hearing the evidence about the waybills, and the introduction of the same by the defendants over the objection of the plaintiff, for the reason as then and there stated by the plaintiff, that the bill of lading introduced in evidence constituted the contract between the parties and controlled their rights, and the waybills being executed solely by the carrier without the shipper joining therein and being for the guidance only of the carrier, were not binding on the shipper and could not control or in any way affect the bill of lading, which objection, as aforesaid, was overruled by the Court.

15. Because the Court erred in permitting the defendant, over the objection of the plaintiff, to allow the witness J. A. Peters to testify how he directed the agent of the carrier to waybill the cattle, for the reason that the bill of lading controlled and not the waybill, and because if there was a mutuality of mistake it was not shown that the plaintiff had knowledge of the mutuality of the mistake.

16. Because the Court erred in permitting the defendants' witness to testify over the objections of plaintiff as to other and different shipments and the manner in which such other and different shipments were handled, and the method said other shipments were handled; for the reason as thereupon urged by plaintiff's counsel that it was immaterial to the issues in this cause how any other shipments were handled and because custom could not vary the terms of the specific written contract.

17. Because the Court erred in permitting the defendants' witness John F. Waite to prove that nothing was done by the First National Bank in Kansas City with reference to the previous shipments as to whether they were paid any sums of money arising from the sale of cattle; for the reason as then urged by counsel for plaintiff said evidence did not show that plaintiff had knowledge of the same and would not be controlled thereby.

18. Because the Court erred in permitting the defendants to prove, by their witness John F. Waite, that there was and had been a custom with reference to how these cattle were handled after they reached Kansas City, and whether or not they were handled on the waybill or otherwise, for the reason as then urged by counsel for plaintiff, such custom was immaterial and could not control the specific contract entered into between the parties, and for the reason that it was not shown that plaintiff, and who was the shipper, had any knowledge of such custom.

19. Because the Court erred in permitting the defendants to prove by their witness John F. Waite that business men, bankers and others dealing in cattle knew of the custom and manner of handling cattle after they reached Kansas City, for the reason as then stated by counsel for plaintiff, that custom could not control the terms of this specific contract, nor govern the rights of the shipper and carrier in reference thereto, and because plaintiff had no knowledge of the same.

20. Because the Court erred in permitting the defendants, over the objection of the plaintiff, to prove by the witness Waite how in each of the seven shipments preceding the one in question, before the cattle were sold and delivered after reaching the Peters Commission Company, that they had taken up and paid drafts drawn against this Company through the First National Bank of Kansas City, for the reason as then stated by counsel for plaintiff it was immaterial and irrelevant how previous shipments were handled; and for the further reason that the — controls in this case as to agreement of parties and it was not brought home to plaintiff how the previous shipments were handled, nor did it, as shipper and owner of the cattle, have any knowledge of previous transactions.

21. Because the Court erred in permitting the defendants to prove, over the objection of the plaintiff, through their witness Waite, in regard to the manner in which drafts were handled and

paid that arrived before cattle did, on previous shipments, because evidence of previous shipments was immaterial and irrelevant and could not control the agreement between the parties; and because said facts were not brought home to plaintiff, the owner and shipper of said cattle.

23. Because there was no evidence showing or tending to show that J. A. Peters was authorized by plaintiff to ship or bill the cattle care Peters Commission Company and the burden being on defendants to show authority and having failed to make such proof, this plaintiff is not bound by said instructions of said J. A. Peters to the carriers' agent and plaintiff and defendants are therefore bound by said contract and under the terms thereof plaintiff is entitled to judgment.

24. Because under the terms of the bill of lading plaintiff was entitled to recover and such bill of lading could not be altered or controlled by any instructions of the said Peters to the carriers' agent, and plaintiff having accepted said bill of lading and relied thereon, the parties are bound thereby and the carrier is estopped as a matter of law from showing contract or any instructions at variance with the terms of said bill of lading.

Wherefore, the premises considered, and for the above and foregoing reasons, this plaintiff respectfully moves the Court to grant it a new trial in this cause.

DYER, CROOM & JONES,
Attorneys for Plaintiff.

(Endorsed:) No. 9181. In the District Court of El Paso County, Texas, 41st Judicial District, September Term, 1919. The City National Bank of El Paso, Texas, Plaintiff vs. The El Paso & Northeastern Railroad Company, et als. Defendants. Plaintiff's Amended Motion for New Trial.

In the District Court of El Paso County, Texas, 41st Judicial District, November Term, 1919.

No. 9181.

THE CITY NATIONAL BANK OF EL PASO, TEXAS, Plaintiff,
vs.

EL PASO & NORTHEASTERN COMPANY et als., Defendants.

Order of Court on Plaintiff's Motion to Enter Order Overruling Motion for New Trial.

Entered Nunc pro Tunc. Bk. 14, Pg. 511.

On this day the 1st day of December, A. D. 1919, came on to be heard the application of the City National Bank of El Paso, Texas,

plaintiff in the above entitled and numbered cause, to have the order
overruling plaintiff's amended motion for new trial hereto-
58 fore made on the 30th day of October, 1919, and at said time
signed by the Court, filed nunc pro tunc, and the defendant
having waived notice on same, the Court having duly considered
plaintiff's said motion to have said order of the Court entered nunc
pro tunc; and it further appearing to the court that said order was
duly made by the Court on said date, duly signed by the Court on
said date, and deposited with the clerk of this court to be entered
upon the minutes of this court, and that the clerk through inad-
vertence, and without any negligence on the part of the plaintiff,
failed to enter said order in the minutes.

It is therefore ordered, adjudged and decreed by the Court that
said order of date the 30th day of October, 1919, overruling plain-
tiff's amended motion for new trial, be and the same is hereby com-
manded to be filed and entered on the minutes nunc pro tunc.

In the District Court of El Paso County, Texas, 41st Judicial Dis-
trict, September Term, 1919.

No. 9181.

THE CITY NATIONAL BANK OF EL PASO, TEXAS, Plaintiff,

vs.

EL PASO & NORTHEASTERN RAILROAD COMPANY et als., Defendants.

Order Overruling Plaintiff's Amended Motion for New Trial.

Bk. 14, Pg. 511.

On this 30th day of October, 1919, and being a regular day of
this term of court, came on to be heard plaintiff's amended motion
for new trial, and same being duly considered by the Court is in all
things overruled, to which action of the Court in overruling said
motion plaintiff then and there in open court, excepted, and
59 gave notice of appeal to the Court of Civil Appeals of the
Eight Supreme Judicial District of the State of Texas; and
good cause having been shown, sixty days from and after this date
is allowed in which to prepare and file bills of exceptions and state-
ment of facts.

In the District Court of El Paso County, Texas, 41st Judicial District.

No. 9181.

THE CITY NATIONAL BANK OF EL PASO, TEXAS,

vs.

EL PASO AND NORTHEASTERN RAILROAD COMPANY et als.

'Appeal Bond.

Filed Nov. 18, 1919.

Whereas, in the above styled and numbered cause pending in the District Court of El Paso County, Texas, 41st Judicial District and at a regular term of said court, to-wit: On the 10th day of October, 1919, the defendants the El Paso & Southwestern Company, the El Paso & Northeastern Railroad Company, the El Paso & Northeastern Railway Company, the El Paso & Rock Island Railway Company, the Chicago, Rock Island & El Paso Railway Company, the Chicago, Rock Island & Gulf Railway Company and the Chicago, Rock Island & Pacific Railway Company, recovered judgment against plaintiff, the City National Bank of El Paso, Texas, a corporation, and recovered judgment that plaintiff the City National Bank of El Paso, Texas, a corporation, take nothing by reason of its suit; and,

Whereas, thereafter, to-wit: on the 30th day of October, A. D. 1919, plaintiff, the City National Bank of El Paso, Texas, filed an amended motion for new trial herein, having previously filed
60. for new trial, and the filing of amended motion for new trial having been granted by the Court; and,

Whereas, on October 30, 1919, said amended motion for new trial was heard by the Court, and the Court having considered same, in all things refused said amended motion for new trial, and refused to grant same, and overruled same, and to the action of the Court in overruling said motion for new trial and said amended motion for new trial the above named appellant and plaintiff, the City National Bank of El Paso, Texas, then and there in open court excepted and gave notice of appeal to the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas, at El Paso, and to which judgment, and to the action of the Court in overruling said motion for new trial the said plaintiff, the City National Bank of El Paso, Texas, has taken an appeal to the Honorable Court of Civil Appeals for the Eighth Supreme Judicial District of Texas, at El Paso, Texas;

Now, therefore, we, the City National Bank of El Paso, Texas, a corporation, as principal, and W. Cooley and J. F. Williams, as sureties, acknowledge ourselves to owe, to be indebted to, liable to pay, and bound to pay to the defendants, the El Paso & Southwestern Company, the El Paso & Northeastern Railroad Company, the El Paso & Northeastern Railway Company, the El Paso & Rock Island

Railway Company, the Chicago, Rock Island & El Paso Railway Company, the Chicago, Rock Island & Gulf Railway Company, and the Chicago, Rock Island & Pacific Railway Company, in the above numbered and entitled cause, and being the appellees herein the sum of Seven Hundred Fifty (\$750.00) Dollars, being at
 61 least double the amount of costs in the Court of Civil Appeals, in the Supreme Court, and the Court below:

Conditioned that the said plaintiff, the City National Bank of El Paso, Texas, and appellant herein, shall prosecute its appeal with effect, and shall pay all the costs which have accrued in the Court below and which may accrue in the Court of Civil Appeals and the Supreme Court, and in case the judgment of the Supreme Court or the Court of Civil Appeals shall be against them, they shall perform its judgment, sentence or decree and pay all such damages and costs as may be awarded them.

Witness our hands this the 18th day of November, A. D. 1919.

[Corp. Seal.]

CITY NATIONAL BANK OF
 EL PASO, TEXAS,
 By J. F. WILLIAMS,
Vice-President,
Principal.

J. F. WILLIAMS,
 W. COOLEY,
Sureties.

Attest:

H. V. WATSON,
Cashier.

Approved and filed this 18th day of Nov. 1919.

C. M. McKINNEY,
Clerk Dist. Court, El Paso, Texas.

I have fixed the probable amount of costs of this suit in the Court of Civil Appeals, the Supreme Court, and the Court below at \$375.00, and approve the above and foregoing bond, this the 18th day of November, A. D. 1919.

C. M. McKINNEY,
Clerk of the District Court of El Paso County, Texas.

62 (Endorsed:) No. 9181. In the District Court of El Paso County, Texas, 41st Judicial District. City National Bank of El Paso, Texas, vs. El Paso and Northeastern Railroad Company, et als. Appeal Bond. Filed Nov. 18, 1919. C. M. McKinney, District Clerk.

In the District Court of El Paso County, Texas, 41st Judicial District,
November Term, A. D. 1919.

No. 9181.

THE CITY NATIONAL BANK OF EL PASO, TEXAS, Plaintiff,

vs.

THE EL PASO & NORTHEASTERN RAILROAD COMPANY et als., Defendants.

Order Extending Time for Filing Statement of Facts and Bills of Exception.

Good cause having been shown, thirty (30) days additional time from and after the 28th day of December, 1919, is allowed and granted to the plaintiff in which to prepare and file statements of facts and bills of exceptions in said cause.

In the District Court of El Paso County, Texas, 41st Judicial District.

No. 9181.

THE CITY NATIONAL BANK OF EL PASO, TEXAS, Plaintiff,

vs.

EL PASO & NORTHEASTERN RAILROAD COMPANY, et als., Defendants.

Plaintiff's Bill of Exception No. 1.

Filed Jan. 22, 1920.

Be it remembered that on the trial of the above styled and numbered cause in this court, the plaintiff before the court's main charge was presented to the jury, duly requested the court in writing to grant plaintiff's special question No. 1, instructing the jury to return a verdict in favor of plaintiff against the defendants the El Paso & Southwestern Railway Company, the El Paso & Northeastern Railway Company, and the Chicago, Rock Island & Pacific Railway Company, for the amount sued upon, which requested instruction was then and there refused by the Court, and to the refusal of the same the plaintiff through its attorneys then and there in open court excepted for the reason that the bill of lading covering the shipment of cattle involved in the suit, as well as the undisputed evidence introduced in said cause, plaintiff was entitled to a judgment against said named defendants; and said plaintiff here now in open court tenders this its bill of exceptions and prays that the same may be examined, signed and approved by the

court and ordered filed as a part of the record in this cause. This the 8th day of January, 1920.

DYER, CROOM & JONES,
Attorneys for Plaintiff.

Presented and agreed to by
DEL. W. HARRINGTON,
Attorney for Defendants.

This bill of exceptions examined, found correct, signed, approved, and ordered filed as a part of the record in this cause. This 8th day of January, 1920.

P. R. PRICE,
Judge 41st Judicial Court, El Paso County, Texas.

(Endorsed:) No. 9181. Pl'ff's Bill of Exception No. 1. Filed this 22 day of January, A. D. 1920. C. M. McKinney, Clerk District Court, El Paso Co., Texas. M. E. Haynes, Deputy.

64 In the District Court of El Paso County, Texas, 41st Judicial District.

No. 9181.

THE CITY NATIONAL BANK OF EL PASO, TEXAS, Plaintiff,

vs.

EL PASO & NORTHEASTERN RAILROAD COMPANY et als., Defendants.

Plaintiff's Bill of Exception No. 2.

Filed Jan. 22, 1920.

Be it remembered that on the trial of the above styled and numbered cause in this court, the plaintiff before the court's main charge was presented to the jury, duly requested the court in writing to grant plaintiff's special question No. 3, as follows: "Do you find from the evidence by a preponderance thereof, that the plaintiff, the City National Bank, on receipt of the bill of lading in question in this suit, relied on same as expressing the true contract between the parties, and were without notice that the way bill directing that the cattle be delivered to the First National Bank care of the J. P. Peters Commission Company." Answer Yes or No."—which requested instruction was then and there refused by the Court, and to the refusal of the same the plaintiff through its attorneys then and there in open court excepted; and said plaintiff here now in open court tenders this its bill of exceptions and prays that the same may be examined, signed and approved by the Court and ordered filed as a part of the record in this cause.

This 8th day of January, A. D., 1920.

DYER, CROOM & JONES,
Attorneys for Plaintiff.

Presented and agreed to by

_____,
Attorneys for Defendants.

65 This bill of exceptions examined, found correct, signed, approved and ordered filed as a part of the record in this cause.

This the 8th day of January, 1920.

P. R. PRICE,
*Judge 41st Judicial District Court,
El Paso County, Texas.*

(Endorsed:) No. 9181. Plff's Bill Exception No. 2. Filed this 22 day of January, A. D. 1920. C. M. McKinney, Clerk District Court El Paso Co., Texas. M. E. Haynes, Deputy.

In the District Court of El Paso County, Texas, 41st Judicial District.

THE CITY NATIONAL BANK OF EL PASO, TEXAS, Plaintiff,

VS.

EL PASO & NORTHEASTERN RAILROAD COMPANY et als., Defendants.

Plaintiff's Bill of Exception No. 3.

Filed Jan. 22, 1920.

Be it remembered that on the trial of the above styled and numbered cause in this court, after the cause having been submitted to the jury upon special issues and the jury had returned into open court their answers to the issues submitted to them by the court, which said verdict of the jury was received and accepted by the Court, the plaintiff in writing moved the court for a judgment under the pleadings and the evidence and the verdict of the jury, which said motion of the plaintiff for judgment was then and there refused by the court, and to which action of the court in refusing said motion for judgment plaintiff then and there excepted, and here
66 now tender this its bill of exceptions and prays that the same may be examined, signed and approved by the court and ordered filed as a part of the record in this cause.

This the 8th day of January, 1920.

DYER, CROOM & JONES,
Attorneys for Plaintiff.

Presented and agreed to by

_____,
Attorneys for Defendants.

This bill of exceptions examined, found correct, signed, approved and ordered filed as a part of the record in this cause. This the 8th day of January, 1920.

P. R. PRICE,
*Judge 41st Judicial District Court,
El Paso County, Texas.*

(Endorsed:) No. 9181. Plff's Bill Exception No. 3. Filed this 22 day of January, A. D. 1920. C. M. McKinney, Clerk District Court El Paso Co., Texas. M. E. Haynes, Deputy.

In the District Court of El Paso County, Texas, 41st Judicial District.

No. 9181.

THE CITY NATIONAL BANK OF EL PASO, TEXAS, Plaintiff,

vs.

EL PASO & NORTHEASTERN RAILROAD COMPANY et als., Defendants.

Plaintiff's Bill of Exception No. 4.

Filed Jan. 22, 1920.

Be it remembered that on the trial of the above styled and numbered cause in this court, the following proceedings were had, to wit:

67 The defendants propounded the following questions to their witness J. P. Peters: "Who on behalf of the First National Bank saw to the making of the contract and the waybills under which they moved from El Paso to Kansas City," to which the witness answered: "I signed all the contracts and looked after that, and all the shipments we have," * * * to which question and answer plaintiff through its attorneys then and there in open court objected for the reason that the contract and bill of lading is one thing and the waybills is another, and is for the railroad's guidance, which objection of the plaintiff was then and there overruled, and to which ruling of the court plaintiff then and there in open court tenders this its bill of exceptions and prays that the same may be examined and approved by the court and ordered filed as a part of the record in this case.

This the 8th day of January, 1920.

DYER, CROOM & JONES,
Attorneys for Plaintiff.

Presented and agreed to by

DEL W. HARRINGTON,
Attorney for Defendants.

This bill of exceptions examined, found correct, signed, approved, and ordered filed as a part of the record in this cause. This the 8th day of January, 1920.

P. R. PRICE,
*Judge of the District Court, 41st Judicial District,
El Paso County, Texas.*

(Endorsed:) No. 9181. Pl'ff's Bill of Exception No. 4. Filed this 22 day of January, A. D. 1920. C. M. McKinney, Clerk District Court, El Paso Co., Texas. M. E. Haynes, Deputy.

68 In the District Court of El Paso County, Texas, 41st Judicial District.

No. 9181.

THE CITY NATIONAL BANK OF EL PASO, TEXAS, Plaintiff,

VS.

EL PASO & NORTHEASTERN RAILROAD COMPANY et als., Defendants.

Plaintiff's Bill of Exception No. 5.

Filed Jan. 22, 1920.

Be it remembered that on the trial of the above styled and numbered cause in this court, while the witness for the defendants, J. P. Peters was testifying, the following proceedings were had, to wit: The counsel for the defendants hands to the witness the live-stock bills for the purpose of introducing the same in evidence, and after hearing evidence about the waybills, to which evidence and the introduction of said waybills in evidence, the plaintiff through its attorneys objected, for the reason that the bill of lading introduced in evidence constituted a contract between the parties and controlled their rights, and the waybills being executed solely by the carrier without the shipper joining therein and being for the guidance only of the carrier, were not binding on the shipper and could not control or in any way affect the bill of lading—which objection to the admission of said testimony and said waybills was overruled by the court, and to which action of the court in admitting said testimony and said waybills plaintiff then and there excepted, and here now in open court tenders its bill of exceptions and prays that the same may be examined, signed and approved by the court and ordered filed as a part of the record in this cause.

This the 8th day of January, 1920.

DYER, CROOM & JONES,
Attorneys for Plaintiff.

69 Presented and agreed to by
DEL W. HARRINGTON,
Attorneys for Defendants.

This bill of exceptions examined, found correct, signed, approved and ordered filed as a part of the records in this cause.

This the 8th day of January, A. D. 1920.

P. R. PRICE,
Judge 41st Judicial District Court,
El Paso County, Texas.

(Endorsed:) 9181. Plff's Bill exception No. 5. Filed this 22 day of January, A. D. 1920. C. M. McKinney, Clerk District Court, El Paso Co., Texas. M. E. Haynes, Deputy.

In the District Court of El Paso County, Texas, 41st Judicial District
No. 9181.

THE CITY NATIONAL BANK OF EL PASO, TEXAS, Plaintiff,

vs.

EL PASO & NORTHEASTERN RAILROAD COMPANY et als., Defendants.

Plaintiff's Bill of Exception No. 6.

Filed Jan. 22, 1920.

Be it remembered that on the trial of the above styled and numbered cause in this court, the following proceedings were had, to-wit: While the defendants' witness J. P. Peters was testifying for the defendants, said witness, over the objections of the plaintiff, testified how he directed the agent of the defendant carrier at El Paso to waybill the cattle in question, plaintiff objecting to said testimony for the reason then given by counsel for the plaintiff, that the bill of lading controlled and not the waybill, and because if there was a mutuality of mistake it was not shown that the plaintiff had knowledge of
70 the mutuality of the mistake, which objection of the plaintiff was overruled by the court, and said evidence as aforesaid was admitted, and to which action of the court in admitting said testimony plaintiff then and there excepted, and here now in open court tenders its bill of exceptions and prays that the same be examined, signed and approved by the Court, and ordered filed as a part of the record in this cause.

This 8th day of January, A. D. 1920.

DYER, CROOM & JONES,
Attorneys for Plaintiff.

Presented and agreed to by
DEL W. HARRINGTON,
Attorneys for Defendants.

This bill of exception examined, found correct, signed, approved, and ordered filed as a part of the record in this cause. This the 8th day of January, 1920.

P. R. PRICE,

*Judge 41st Judicial District Court,
El Paso County, Texas.*

(Endorsed:) No. 9181. Pl'ff's bill Exception No. 6. Filed this 22 day of January, A. D. 1920. C. M. McKinney, Clerk District Court El Paso Co., Texas. M. E. Haynes, Deputy.

In the District Court of El Paso County, Texas, 41st Judicial District.

No. 9181.

THE CITY NATIONAL BANK OF EL PASO, TEXAS, Plaintiff,

VS.

EL PASO & NORTHEASTERN RAILROAD COMPANY et als., Defendants.

71

Plaintiff's Bill of Exception No. 7.

Filed Jan. 22, 1920.

Be it remembered that on the trial of the above styled and numbered cause in this court, while the witness John F. Waite was testifying for the defendants, said witness over the objections of the plaintiff, testified as to other and different shipments and the manner in which such other and different shipments were handled, and the method — such other shipments were handled, plaintiff then and there objected to such testimony for the reason, as then stated, that it was immaterial to the issues in this cause how any other shipments were handled and because custom could not vary the terms of the specific written contract, and which objections of the plaintiff to such testimony was overruled by the court, and to which action of the court in admitting said testimony the plaintiff then and there excepted, and here now in open court tenders its bill of exceptions and prays that the same may be examined, signed, and approved by the court and ordered filed as a part of the record in this cause.

This 8th day of January, A. D. 1920.

DYER, CROOM & JONES,

Attorneys for Plaintiff.

Presented and agreed to by

DEL W. HARRINGTON,

Attorneys for Defendants.

This bill of exceptions examined, found correct, signed, approved and ordered filed as a part of the record in this cause. This the 8th day of January, A. D. 1920.

P. R. PRICE,

*Judge 41st Judicial District Court,
El Paso County, Texas.*

(Endorsed:) No. 9181. Plff's Bill of Exception No. 8.
 Filed this 22 day of January, A. D. 1920. C. M. McKinney,
 Clerk District Court, El Paso Co., Texas. M. E. Haynes, Deputy.

In the District Court of El Paso County, Texas, 41st Judicial District.

No. 9181.

THE CITY NATIONAL BANK OF EL PASO, TEXAS, Plaintiff,

vs.

EL PASO & NORTHEASTERN RAILROAD COMPANY et als., Defendants.

Plaintiff's Bill of Exception No. 8.

Filed Jan. 22, 1920.

Be it remembered that on the trial of the above styled and numbered cause, in this court, while the witness John F. Waite was testifying for the defendants, said witness, over the objections of the plaintiff, testified that nothing was done by the First National Bank of Kansas City with reference to the previous shipments as to whether they were paid any sum of money arising from the sale of cattle. plaintiff then and there objected to such testimony for the reason as then urged by plaintiff, that said evidence did not show plaintiff had knowledge of the same and would not be controlled thereby, and which objections of the plaintiff to such testimony was overruled by the court, and to which action of the court in admitting said testimony the plaintiff then and there excepted, and here now in open court tenders its bill of exceptions and prays that the same may be examined, signed and approved by the Court and ordered filed as a part of the record in this cause.

This the 8th day of January, 1920.

DYER, CROOM & JONES,
Attorneys for Plaintiff.

Presented and agreed to by
 DEL W. HARRINGTON,
Attorneys for Defendants.

This bill of exceptions examined, found correct, signed, approved, and ordered filed as a part of the record in this cause.
 This the 8th day of January, A. D. 1920.

P. R. PRICE,
*Judge 41st Judicial District Court,
 El Paso County, Texas.*

(Endorsed:) No. 9181. Plff's Bill of Exceptions No. 8. Filed this 22 day of January, A. D. 1920. C. M. McKinney, Clerk District Court, El Paso Co., Texas. M. E. Haynes, Deputy.

in the District Court of El Paso County, Texas, 41st Judicial District.

No. 9181.

THE CITY NATIONAL BANK OF EL PASO, TEXAS, Plaintiff,

vs.

EL PASO & NORTHEASTERN RAILROAD COMPANY et als., Defendants.

Plaintiff's Bill of Exceptions No. 9.

Filed Jan. 22, 1920.

Be it remembered that on the trial of the above styled and numbered cause in this court, while the witness John F. Waite was testifying for the defendants, said witness, over the objections of the plaintiff, testified that there was and had been a custom with reference to how these cattle were handled after they reached Kansas City, and whether or not they were handled on the waybills or otherwise, to the admission of which testimony plaintiff through its counsel then and there objected for the reason as then urged, such custom was immaterial and could not control the specific contract entered into between the parties, and for the reason it was not shown that plaintiff, and who was the shipper, had any knowledge of such custom; and which objections of the plaintiff to such testimony were overruled by the Court, and to which action of the court in admitting said testimony the plaintiff then and there excepted, and here now in open court tenders this its bill of exceptions and prays that the same may be examined, signed, and approved by the Court, and ordered filed as a part of the record in this cause.

This the 8th day of January, A. D. 1920.

DYER, CROOM & JONES,
Attorneys for Plaintiff.

Presented and agreed to by
DEL W. HARRINGTON,
Attorneys for Defendants.

This bill of exceptions examined, found correct, signed, approved, and ordered filed as a part of the record in this cause. This the 8th day of January, A. D. 1920.

P. R. PRICE,
*Judge 41st Judicial District Court,
El Paso County, Texas.*

(Endorsed:) No. 9181. Plff.'s Bill Exceptions No. 9. Filed this 22 day of January, A. D. 1920. C. M. McKinney, Clerk District Court El Paso Co., Texas. M. E. Haynes, Deputy.

In the District Court of El Paso County, Texas, 41st Judicial District,

No. 9181.

THE CITY NATIONAL BANK OF EL PASO, TEXAS, Plaintiff,

vs.

EL PASO & NORTHEASTERN RAILROAD COMPANY et als., Defendants.

75

Plaintiff's Bill of Exception No. 10.

Filed Jan. 22, 1920.

Be it remembered that on the trial of the above styled and numbered cause in this court, while the witness John F. Waite was testifying for the defendants, said witness, over the objections of the plaintiff, testified that business men, bankers and others dealing in cattle knew of the custom and manner of handling cattle after they reached Kansas City, to which testimony counsel for the plaintiff in due time objected for the reason, as then stated, that custom could not control the terms of this specific contract, nor govern the rights of the shipper and carrier in reference thereto, and because the plaintiff had no knowledge of the same, and which objections of the plaintiff to such testimony were overruled by the Court and to which action of the Court in submitting said testimony the plaintiff then and there excepted, and here now in open court tenders this its bill of exceptions and prays that the same may be examined, signed, and approved by the Court and ordered filed as a part of the record in this cause.

This the 8th day of January, A. D. 1920.

DYER, CROOM & JONES,

Attorneys for Plaintiff.

Presented and agreed to by

DEL W. HARRINGTON,

Attorneys for Defendants.

This bill of exceptions examined, found correct, signed approved and ordered filed as a part of the record in this cause. This the 8th day of January, A. D. 1920.

P. R. PRICE,

Judge 41st Judicial District Court,

El Paso County, Texas.

76

(Endorsed:) No. 9181. Plff.'s Bill of Exceptions No. 10.

Filed this 22 day of January, A. D. 1920. C. M. McKinney,
Clerk District Court, El Paso Co., Texas. M. E. Haynes, Deputy.

In the District Court of El Paso County, Texas, 41st Judicial District.

No. 9181.

THE CITY NATIONAL BANK OF EL PASO, TEXAS, Plaintiff,

vs.

EL PASO & NORTHEASTERN RAILROAD COMPANY et als., Defendants.

Plaintiff's Bill of Exception No. 11.

Filed Jan. 22, 1920.

Be it remembered that on the trial of the above styled and numbered cause in this court, while the witness John F. Waite was testifying for the defendants, said witness, over the objections of the plaintiff, testified how each of the seven shipments preceding the one in question, before the cattle were sold and delivered after reaching the Peters Commission Company, that they had taken up and paid drafts drawn against this Company through the First National Bank in Kansas City, and to which testimony the counsel for plaintiff objected in due time and for the reason, as then stated, that it was immaterial and irrelevant how shipments were handled; and for the further reason that the contract controls in this case as to agreement of parties and it was not brought home to plaintiff how the previous shipments were handled, nor did it, as shipper and owner of the cattle, have any knowledge — transactions, and which objections of the plaintiff to such testimony were overruled by the Court and to which action of the Court in admitting said testimony the plaintiff then and there excepted, and here now in open court tenders its bill of exceptions and prays that the same may be examined, signed, and approved by the Court and ordered filed as a part of the record in this cause.

This the 8th day of January, A. D. 1920.

DYER, CROOM & JONES,
Attorneys for Plaintiff.

Presented and agreed to by
DEL W. HARRINGTON,
Attorneys for Defendants.

This bill of exceptions examined, found correct, signed, approved and ordered filed as a part of the record in this cause. This the 8th day of January, 1920.

P. R. PRICE,
*Judge 41st Judicial District Court,
El Paso Co., Tex.*

(Endorsed:) No. 9181. Plff.'s Bill of Exceptions No. 11. Filed this 22 day of January, A. D. 1920. C. M. McKinney, Clerk District Court, El Paso Co., Texas. M. E. Haynes, Deputy.

In the District Court of El Paso County, Texas, 41st Judicial District.

No. 9181.

THE CITY NATIONAL BANK OF EL PASO, TEXAS, Plaintiff,

vs.

EL PASO & NORTHEASTERN RAILROAD COMPANY et als., Defendants.

Plaintiff's Bill of Exception No. 12.

Filed Jan. 22, 1920.

Be it remembered that on the trial of the above styled and numbered cause in this court, while the witness John F. Waite was
78 testifying for the defendants, said witness, over the objections of the plaintiff, testified in regard to the manner in which drafts were handled and paid that arrived before cattle did, on previous shipments, to the one in question, plaintiff *thought* its counsel objecting in due time, for the season as then stated, that *that* the evidence on previous shipments was immaterial and irrelevant and could not control the agreement between the parties; and because said facts were not brought home to plaintiff, the owner and shipper of said cattle; and which objections of the plaintiff to such testimony were overruled by the Court, and to which action of the Court in admitting said testimony the plaintiff then and there excepted, and here now in open court tenders its bill of exceptions and prays that the same may be examined, signed and approved by the Court and ordered filed as a part of the record in this cause.

This the 8th day of January, 1920.

DYER, CROOM & JONES,
Attorneys for Plaintiff.

Presented and agreed to by

DEL W. HARRINGTON,
Attorneys for Defendants.

This bill of exceptions examined, found correct, signed, approved and ordered filed as a part of the record in this cause. This the 8th day of January, 1920.

P. R. PRICE,
*Judge 41st Judicial District Court,
El Paso County, Texas.*

79 (Endorsed:) No. 9181. Plff.'s Bill of Exceptions No. 12.
Filed this 22 day of January, A. D. 1920. C. M. McKinney,
Clerk District Court, El Paso Co., Texas. M. E. Hayles, Deputy.

THE STATE OF TEXAS:

No. 9181.

CITY NATIONAL BANK OF EL PASO, TEXAS,

vs.

EL PASO & NORTHEASTERN R. R. Co. et al.

To Officers of Court, Dr.

*The Costs Accrued in the Above-entitled Cause to Adjournment of
— Term, 191—.*

Clerk's Fees.

Doc-uting Cause	20
Filing paper (47)	7.05
Entering appearances (2)	30
Doc-uting Motion (4)	60
2 Citations and 5 Copies	4.00
Swearing and Empaneling Jury	35
Receiving and Recording Verdict	35
Entering Sheriff's return on Citation	1.00
Approving 1 bond	1.50
6 Subpoenas	1.50
Swearing 5 witnesses	50
Entering 8 Orders	6.00
Judgment	1.00
Excess in judgment	1.10
Taxing Costs and Copy (2)	50
Transcript of Court of Appeals	36.60
	<hr/>
	\$62.55

60

Sheriff's Fees.

Executing Citations and Mil-age	3.95
Summoning — Witnesses and Mil-age	3.30
Jury Fee	50
	<hr/>
	\$7.75

Recapitulation.

Jury Fee	5.00
Stenographer's Fee	3.00
Notary's Fee—Deposition of	30.35
Clerk's Fees	62.55
	<hr/>
	\$108.65

THE STATE OF TEXAS,
County of El Paso:

I hereby certify the above to be a correct account of the Costs in the above entitled and numbered suit, up to this date.

Witness my hand and Seal of said Court, affixed at office in El Paso, Texas, this 23rd day of January, 1920.

Attest:

[SEAL.]

C. M. McKINNEY,
Clerk District Court, El Paso County,
By M. E. HAYNES,
Deputy.

Clerk's Certificate.

THE STATE OF TEXAS,
County of El Paso:

I, C. M. McKinney, Clerk District Court in and for El Paso County, Texas, 41st Judicial District, do hereby certify that 81 the foregoing transcript of 61 pages contains a true and correct copy of all proceedings had in cause No. 9181, wherein The City National Bank of El Paso, Texas, is plaintiff and the El Paso & Northeastern Railroad Company, et als., are defendants, as the same appear of record in my office.

Given under my hand and the seal of said court this, the 23rd day of January, A. D. 1920.

[SEAL.]

C. M. McKINNEY,
Clerk District Court, El Paso County, Texas,
41st Judicial District,
By M. E. HAYNES,
Deputy.

Court of Civil Appeals, El Paso, Texas. Filed Jan. 24th, A. D. 1920. J. I. Driscoll, Clerk.

In the District Court of El Paso County, Texas, 41st Judicial District, September Term, A. D. 1919.

No. 9181.

CITY NATIONAL BANK

vs.

EL PASO & NORTHEASTERN RAILROAD COMPANY et al.

Statement of Facts.

Be it remembered, that on the trial of the above styled and numbered cause the following was all the oral and documentary evidence introduced:

It was agreed between counsel for the Plaintiff and Defendants, that N. S. Good, had authority as deputy sheriff to serve the following citation, and if he were personally present he would testify to the statements made in the return on the paper he served.

Here counsel for the plaintiff introduced and read in evidence the following citation, with the return thereon:

THE STATE OF TEXAS:

To the Sheriff or any Constable of El Paso County, Greeting:

You are hereby Commanded to Summon El Paso & Northeastern Railroad Company, doing business under the name of El Paso & Southwestern Company, Chicago, Rock Island & Gulf Railway Company and Chicago, Rock Island & Pacific Railway Company to be and appear before the Honorable District Court of El Paso County, Texas, 41st Judicial District, at the next regular term hereof, to be holden at the Court House in the City of El Paso, on the 1st Monday in March, A. D. 1912, the same being the 4th day of March, A. D. 1912, then and there to answer Plaintiff's petition filed in a suit in said Court on the 20th day of February, A. D. 1912, wherein City National Bank is Plaintiff, and El Paso & North Eastern Railroad Company, doing business under the name of El Paso & Southwestern Company, Chicago, Rock Island & Gulf Railway Company and Chicago, Rock Island & Pacific Railway Company are Defendants File number of said suit being No. 9181.

83 The nature of the plaintiff's demand is as follows, to-wit: Suit for damages in the sum of Ten Thousand and One Dollar- and eighteen cents (\$10,001.18). That on the 27th day of October, A. D. 1911, for and in consideration of the lawful freight rates to be paid defendant, El Paso & North Eastern Railroad Company, acting in the name of El Paso & Southwestern Company, by said plaintiff, the said defendant agreed, by its connecting carriers, safely to carry from said City of El Paso, Texas, to Kansas City, in the State of Missouri, and there to deliver to the First National Bank, a corporation duly incorporated, the consignee, at said place, eight hundred and forty-seven (847) head of cattle of the reasonable value of twenty thousand dollars (20,000.00), the property of said plaintiff and in its possession, which said plaintiff then and there at El Paso, Texas, delivered to said El Paso & Northeastern Railroad Company, acting in the name of El Paso & Southwestern Company, who then and there received and accepted the same, upon the agreement and for the purposes above mentioned.

"That defendant did not carry and deliver said cattle pursuant to said agreement, as they were in duty bound so to do; but, on the contrary, so carelessly and negligently acted in regard to the same in their business as common carriers, that they were wholly lost to plaintiff, to its damage in the sum of \$10,001.18.

Wherefore, plaintiff prays judgment for its damages in the sum of \$10,001.18, with interest and costs and for such other and further

relief, special and general, in law and in equity, that it may be entitled to.

84 "You will deliver to said defendant, El Paso & North Eastern Railroad Company, doing business under the name of El Paso & Southwestern Company, Chicago, Rock Island & Gulf Railway Company and Chicago, Rock Island & Pacific Railway Company, in person a true copy of this Citation.

"Herein Fail Not, and have you before said Court this Writ, with your endorsement thereon, showing how you have executed the same.

"Given under my hand and the seal of said Court, at office in El Paso, Texas, this the 20th day of Feb. A. D. 1912.

Attest:

I. ALDERETE,
Clerk District Court, El Paso County, Texas.
By M. E. GOODSON,
Deputy.

"Sheriff's Return.

"Came to hand on the 20th day of February, 1912, at 2.00 o'clock P. M., and executed by delivering to the within named defendants, in person, a true copy of this Citation, in the city of El Paso, El Paso County, State of Texas, on the dates and at the places hereinafter set forth, as follows: To the El Paso & Southwestern Ry. Co. in person of its local agent W. S. Dawson, at 3.15 o'clock, P. M. the 20th day of February, A. D. 1912, at Freight depot of E. P. & S. W. on the cor. of Franklin and N. Ochoa a true copy of the within citation.

"To the Chicago, Rock Island and Gulf Rwy. Co. in person of its local agent R. R. Seeds, at 3.00 o'clock P. M. the 20th day of February A. D. 1912, at R. I. office 308 Mesa Ave. a true copy of the within citation.

85 "By delivering to C. R. I. & P. Ry. Co. within defendant by delivering to R. R. Seeds, in person a true copy of this within, Com-ercial Agt. Rock Island lines on 21st day of Feb. 1912 at No. 408 Mesa Ave. 11.45 o'clock a. m.

"I actually and necessarily traveled 3 miles in the service of this process, in addition to any other mileage I may have traveled in the service of other process in the same case during the same trip.

PEYTON J. EDWARDS,
Sheriff El Paso County, Texas.
By N. S. GOOD,
Deputy.

Rees:

Serving 3 copies.....	\$2.25
Mileage 3.....	.15
Total	2.40

Endorsed: "File No. 9181. District Court, El Paso County, Texas, 41st Judicial District, March Term, 1912. City National

Bank vs. El Paso & North Eastern Railroad Company, et al. Citation. Issued Feb. 20th, 1912. I. Alderete, District Clerk, by M. E. Goodson, Deputy. Filed Feb. 22, 1912, by I. Alderete, Clerk District Court, El Paso County, Texas, by E. J. Redding, Deputy."

Here counsel for the Defendants introduced and read in evidence the following statement in connection with the foregoing citation: "R. R. Seeds refused to accept service for Chicago, Rock Island & Pacific Railway Company, stating that the Chicago, Rock Island & Pacific Company had no agent in the —."

86 W. S. DAWSON, a witness for the Plaintiff, being first duly sworn, testified as follows:

My name is W. S. Dawson, I live in El Paso, and have for twelve years, I have been railroad agent here for the El Paso & Southwestern and general claim agent. I worked for no one besides the El Paso & Southwestern Company. I was local agent of the El Paso & Southwestern on February 20, 1912, with office in El Paso, Texas, I remember the suit of the City National Bank in this Court against the El Paso & Northeastern, El Paso & Southwestern and other companies. My file in connection with this claim is at the local station. When suits were filed against the El Paso & Southwestern Company I was served as a rule. I do not know who else service was made on. I received several hundred. When I received them I sent them to the general attorneys, Hawkins & Franklin, with offices in the general office building. They represented the Southwestern Lines, the same I was agent for, viz: the El Paso & Northeastern Railroad Company of Texas and the El Paso & Southwestern Railroad Company of Texas; that is all in El Paso. The El Paso & Northeastern Railroad went from El Paso to Newman, New Mexico, just across the border, and the El Paso & Southwestern Railroad Company of Texas went to the State line West of El Paso. I think the El Paso & Southwestern Company had offices in New York. I was agent for the El Paso & Southwestern System, the trade name was El Paso & Southwestern System, representing the El Paso & Northeastern Railroad Company. Those roads were known among the general public as the El Paso & Southwestern System. He used a contract for shipment over the El Paso & Northeastern. J. C. Wall-

87 work issued that contract. I was one local agent here, there were two. I was local agent for the El Paso & Northeastern Railroad Company of Texas, and the El Paso & Southwestern Railroad Company of Texas. Those were the only two doing business in the County as far as I was concerned. I had no connection with the El Paso & Southwestern Company, and never had any before that time that I know of. Our attorneys were Hawkins, Franklin & Peticolas. I could not tell you who filed the answer in this case. I was not claim agent for the El Paso & Southwestern Company at that time nor for the El Paso & Southwestern western System. I was station agent of the El Paso & Southwestern system representing the El Paso & Northeastern Railroad Company of Texas and the El Paso & Southwestern Railroad Company of Texas, two lines. I was not local

agent of the El Paso & Southwestern Company, they had none that I know of. They had a claim agent here at that time, W. I. Hamilton, that is the El Paso & Southwestern System did. I could not tell you who was claim agent for the El Paso & Southwestern Company. All the business of the El Paso & Southwestern Railroad Company of Texas, and the El Paso & Northeastern Railroad Company of Texas was done in El Paso in the general office building. I am not qualified to state where the El Paso & Southwestern Company's business was attended to. I do not know that they all used the same offices. I know that Hawkins & Franklin were representing the El Paso & Southwestern System at El Paso, and all the contributing lines, as far as I know. If I received a citation I would turn it over to the attorneys, or the general manager, H. J. Simmons;

88 Simmons; my recollection is the papers went to him, I am not sure. Mr. Hawley was auditor at that time. He was connected with the El Paso & Southwestern System. Mr. Hawks was connected with the same people, they all had offices in the Southwestern Building, and the attorneys as well. My office at that time was at the corner of Franklin & Ochoa Streets. If I can I will find out what I did with the citation served on me in this case, that has been something like seven years ago, and I doubt if I can locate it. I kept good records, I was not in the habit of destroying them only in accordance with the Commission's orders. These records would be destroyed if the Commission did not ask us to hold them seven years. It would not make any difference if this case has been pending seven years. I would destroy them in a case that was pending unless requested to hold them. I don't know whether I was requested in this case. I will try and locate them. I was local agent of the El Paso & Northeastern Railroad Company of Texas, that ran from El Paso to Newman. We did business under the name of the El Paso & Southwestern Company. I know Mr. Wallwork very well. His offices were located on Santa Fe Street, this side of the International Bridge. He was working for the Joint Warehouse, all the lines interested in El Paso, that is the G. H. & S. A., the E. P. & N. E., of Texas, the E. P. & S. W. of Texas, the Southern Pacific Company, and the R. G. E. P. & S. F. He was joint agent for all the companies. His salary, I think, was paid by all lines interested. He was agent of the El Paso & Northeastern Railroad Company at that time on Mexico business, and I was local agent at that time, and that was the company that actually received this shipment under this bill of lading, according to the contract, I don't know of my own knowledge. The El Paso & Northeastern Railroad Company of Texas is the only line representing us connecting with the Rock Island out of El Paso.

Here counsel for the Plaintiff introduced and read in evidence the original answer in this case, which is as follows:

"In the District Court of the 41st District of the State of Texas for El Paso County.

No. 9181.

CITY NATIONAL BANK, Plaintiff,

vs.

EL PASO AND NORTHEASTERN RAILROAD COMPANY et als.,
Defendants.

Original Answer.

"Comes now the defendants and for answer to the petition of plaintiff filed herein say:

"1st. Defendants except to said petition and for grounds of exception state that the same does not set up fact sufficient to constitute a cause of action, and of this they pray the judgment of the Court.

HAWKINS & FRANKLIN,
Attorneys for Defendant.

"2nd. And for further answer in this behalf defendants deny each and every allegation contained in said petition and deny that they or either of them — of any of the wrongs, injuries or trespasses of which the plaintiff has complained against them, and of this they put themselves upon the country.

HAWKINS & FRANKLIN,
Attorneys for Defendant."

90 Indorsed: "9181. District Court of El Paso County, Texas, 41st Judicial District. City National Bank vs. El Paso & Northeastern Railroad Co. et al. Original Answer. Filed Mar. 2, 1912. I. Alderete, District Clerk, El Paso County, Texas, by M. M. Phinney, deputy".

Here counsel for the Plaintiffs introduced and read in evidence the duplicate bill of lading, which was furnished the plaintiff at the time of the shipment in question, and which accompanied the draft to Kansas City, which is as follows:

"Livestock Contract.

"El Paso & Southwestern System.

"Instructions to Agents and Shippers.

"For rules governing the question of transportation of live stock attendants, see tariff.

"Live stock in quantities of less than full carload will be charged for on the basis of the estimated weights, as per current classifications.

"When carload rates are shown per hundred pounds, they are subject to the regular established minimum weights as shown in the tariffs.

"The following contract, when executed by the shipper and agent, and endorsed by the person or persons in charge of shipment, with such endorsement certified to in ink by the agent, will entitle such person or persons to ride on same train with the stock, to care for same, and is authority for conductors to pass them.

91 "Conductors must punch contract, or, in the absence of punch, will endorse his (the conductor's) name on back of the contract when presented for passage.

"Agents will permit only the names of owners, or bona fide employees, who accompany this stock to be entered on the back of the contract, without regard to number of passes allowable by number of cars in shipment.

"As a means of identification, agent issuing this contract will indicate with (X) punch marks in column 1 of the marginal space shown hereon the personal description of the attendant in charge of the stock covered by the contract. Should the contract carry more than one attendant in charge, agent will punch in additional columns (2 and 3) care being taken to have the description coincide with the parties whose names appear on the back of the contract.

"Agents of this Company are not authorized to agree to forward livestock to be delivered at any specified time or for any particular market.

"After shipments have been properly way-billed, agents of this Company must send the duplicate contract by first passenger train to General Auditor, El Paso, Texas.

"Agents of this Company and shipper or shipper's agent must sign this contract in duplicate.

Contract.

"Executed in duplicate at El Paso, Tex., Station 10/27/1911.

92 "This agreement made between the El Paso & Southwestern Company of the first part, and City Nat. Bank of the Second part.

"Witnesseth: That for the considerations and mutual covenants, and conditions herein contained, the said first party will transport for the said second party the livestock described below, and the parties in charge thereof, as hereinbefore provides: 28 cars, said to contain 147 head of cattle from El Paso, Texas, station to Tucumcari Station, consigned to 1st Natl. Bank Kansas City, Mo., at published tariff rate; said rate being less by virtue of the execution of this contract than rate for shipment transported without limitation of carrier's liability except at common law, and in consideration of said rate, and other considerations, it is mutually agreed between the parties hereto as follows:

First. That the livestock covered by this contract is not to be transported within any specified time, nor delivered at destination at any particular hour, nor in season for any particular market.

Second. That the first party is exempt from all liability for loss or damage to the person or persons, or property covered by this contract, arising from derailment, collision, fire, escapement from cars, heat, suffocation, overloading, crowding, maiming, or accidents or causes not arising from the negligence of the first party, and said second party hereby agrees to assume and does hereby assume all risk of injury or loss of his stock, because of their being wild, unruly, weak or maiming each other or themselves, or of heat, suffocation, or other results of being crowded in the cars, or being
93 injured or destroyed by fire on any account whatever, and especially because of burning hay, straw or other materials use for bedding the cars, or feeding the stock, or for any other purpose not caused by the negligence of the second party.

Third. That said second party, at his own risk and expense, is to take care of, feed, water and attend to said stock while the same may be in the stockyards of the first party, or elsewhere, awaiting shipment, and while the same is being loaded, transported, unloaded and reloaded, and to load, unload and reload the same at feeding and transfer points, and wherever the same may be unloaded and reloaded for any purpose whatever and hereby covenants and agrees to hold said first party harmless on account of any loss or damage to his said stock while being so in his charge and so cared for and attended to by him or his agents or employes as aforesaid, and in case the first party should, for any reason, undertake to water and feed said stock, it shall not be liable for insufficient supplies or imperfect discharge of such undertaking.

"Fourth. The first party shall be exempt from all liability for loss or damage to the person or persons or property covered by this contract, caused by mobs, strikes or threatened or actual violence from any source, or for loss, damage or delay caused by the act of God, the public enemy, quarantine, the authority of the law or act or default of the shipper or owner.

94 Fifth. That in all cases when said first party shall furnish, for the accom-odation of said second party, laborers to assist in loading his stock they shall be entirely subject to his orders, and deemed his employees while so engaged, and he hereby agrees to hold said first party harmless on account of their acts.

"Sixth. That for the consideration aforesaid said second party further expressly agrees that as a condition precedent to his right to any damage or any loss or injury to his said stock during the transportation thereof, or previous to loading thereof for shipment, he will give notice in writing of his claim therefor, stating the grounds thereof, to the nearest or any other convenient local agent of said first party, or to its nearest station agent or to the agent at the delivering station on the railroad which carries said stock to destina-

tion, or to the nearest or any other convenient local agent of such delivering road before said stock is removed from the point of shipment or from the place of destination, and before such stock is mingled with other stock, and immediately after the delivery of such stock at its point of destination, to the end that such claims may be fully and fairly investigated and will afford a full and fair opportunity for the investigations thereof, and a failure to comply in every respect with these conditions shall be held to be a waiver by said second party of any such claims, and shall be a complete bar to any recovery thereof. No one except a general officer of said first party has authority to waive such notice and he only in writing.

95 And that as a condition precedent to bringing any suit for damages for loss or injury to the person or persons or property covered by this contract, shall give notice in writing of the claim for damage to some general officer, claim agent or station agent of the said first party not later than four months after the date of the loss or injury claimed, and any failure to strictly comply with this provision shall be a bar to recovery of any and all damages occasioned to the person or persons or property embraced in or being transported under this contract.

"Seventh. This contract does not entitle the holder thereof, or any other person, to ride on any train except on the train in which the livestock is transported, and then only for the purpose of caring for such livestock, nor to return passage unless return passage is authorized under the rules appearing in the tariffs of the said first party, which are hereby made a part of this contract, and unless the contract is presented to a properly authorized agent of the first party for return passage within the time prescribed by the rules of said first party all of which is hereby made a part of this contract.

"Eighth. That such return ticket, issuance of which is authorized only in the manner set forth above, shall be used by such person or persons only whose names are written herein Carter Hunt, W. J. Erwin, U. Simpson, and who actually accompanied the livestock for the purpose of caring therefor, and shall not include minors, women or other persons unable to perform the services of caring for livestock in transit, as required in this contract: and persons to be entitled to return tickets under the terms of this contract shall perform
96 the journey within the time and in accordance with the regulations of said first party as shown on such ticket, all of which is hereby made a part of this contract.

"Ninth. For the consideration aforesaid the said second party hereby further agrees that the said persons in charge of said stock, under this contract, shall remain in the caboose car attached to the train while the same is in motion, and that whenever such person leaves the caboose car, or pass over along or beside the cars or track, they will do so at their own risk of personal injury from any cause what ever, and said first party shall not be required to start or stop its train or caboose cars from or at the depots or platforms, or to furnish lights for the accommodation or safety of such persons in getting on or off such cars or otherwise.

"Tenth. It is further stipulated and agreed between the parties hereto that in case the livestock mentioned herein is to be transported over the roads of any other railroad company, the said party of the first part shall be released from liability of every kind after said stock shall have left its road, and the party of the second part hereby so expressly stipulates and agrees, it being distinctly understood that the liability of the party of the first part in respect to said stock, and under this contract, is limited to its own line of railroad, and will cease and its part of this contract be fully performed upon delivery to its next connection carrier of the stock mentioned herein, and receipted for hereby. The understanding of both parties hereto being that the party of the first part shall not be held or deemed liable for anything in connection with said stock beyond its own line of road. It is expressly agreed, however, that the conditions of this contract shall inure to the benefit of all carriers transporting the livestock shipped hereunder, unless they otherwise stipulate, but in no event shall one carrier be liable for the negligence of another.

"Eleventh. No person other than the owner of the stock shipped, or his duly authorized agent in the name of the owner, shall be allowed to sign this contract.

"Twelfth. It is also expressly understood that all promises and agreements respecting or in anywise relating to the subject hereof are fully expressed herein, and no others, are made or exist.

"Thirteenth. First party hereby admits that it has received at the station and on the date first above written, from second party, certain livestock as hereinbefore described, to be transported as aforesaid at the rate or rates, and subject to the rules and conditions hereinbefore and hereinafter referred to, and agrees that said livestock will be delivered as aforesaid unto second party or order, or assigns, or connecting lines if destined beyond, subject to the conditions hereinbefore expressed on the payment of transportation charges as agreed.

"Fourteenth. This contract is executed in duplicate, one part to be retained by the Railway Company, the other to be delivered to the shipper, and each of said parts, whether designated original or duplicate, it is understood and declared to be of equal force and effect with the other as evidence, and for all other purposes, and in all other senses is an original contract.

98 "Fifteenth. That in making this contract the undersigned owner, or agent of owner, of the stock named herein (Expressly acknowledges that his attention has been directed to the carrier's different rates and limitation of liability on stock of different valuations, and declares the value of this shipment to be \$30. per head, and that it is entitled to rates published by carriers applying on stock of said valuation.

"Sixteenth. That the evidence that second party, after fully understanding and accepting the terms, covenants and conditions of this contract including the printed rules and regulations on the back hereof, and that it all constitutes a part hereof, fully assents to each and all of same, in his signature hereto.

No. of cars.	Initials.	No. of head.	Series.	Way- bill No.
9279	E. P. & S. W.	30	F	779
9006	"	30	"	780
9097	"	30	"	781
9036	"	30	"	782
9065	"	30	"	783
9104	"	30	"	784
9098	"	30	"	785
9221	"	30	"	786
9826	"	30	"	787
9186	"	30	"	788
9191	"	30	"	789
9156	"	30	"	790
9200	"	30	"	791
9190	"	30	"	792
99				
9168	"	30	"	793
9236	"	30	"	794
9214	"	30	"	795
9197	"	30	"	796
9245	"	30	"	797
9156	"	30	"	798
9185	"	30	"	799
9157	"	31	"	800
9182	"	31	"	801
9001	"	31	"	802
9015	"	31	"	803
9185	"	31	"	804
9117	"	31	"	805
9181	"	31	"	806
9018	"	31	"	807

J. C. WALLWORK,

Agent for the Company.

CITY NATIONAL BANK,

By J. A. PETERS,

Shipper.

Witness:

ELI JARVIS."

W. S. DAWSON, a witness for the Plaintiff, being recalled, testified as follows:

Redirect examination:

This is a copy of the transmittal of the citation in this suit to H. J. Simmons. My impression is we sent a carbon copy to the attorneys, it is addressed to the attorneys.

100 Here counsel for the Plaintiff introduced and read in evidence said letter of transmittal, which is as follows:

"El Paso & Southwestern System.

El Paso, Texas, Feb. 20, 1912.

Mr. H. J. Simmons, General Manager:
Mr. G. F. Hawks, General Superintendent:
Mr. A. L. Hawley, General Auditor:
Mr. F. B. King, Superintendent:

"Served on me today at 3:15 P. M. Citation 9181, in suit City National Bank vs. El Paso & Northeastern Railroad Company et al. amount \$10,001.18 for alleged loss of 847 head of cattle destined to Kansas City. Summons is to appear before the 41st District Court of El Paso, Texas, March 4, 1912. All papers to H. J. Simmons. File 7349."

That was the means I employed to communicate to the general manager that suit had been instituted, in line with my duties as local agent. Mr. Simmons at that time was general manager of the El Paso & Northeastern Railroad Company of Texas and the El Paso & Southwestern Railroad Company of Texas. This is a letter from Mr. Simmons to Hawkins & Franklin in reference to this citation in 9181, that is the same citation referred to in my message.

Here counsel for the Plaintiff introduced and read in evidence the following letter:

101 "El Paso & Southwestern.

J. H. Simmons,
General Manager,
El Paso, Texas.

February 20, 1912. 210.

"Messrs. Hawkins & Franklin,
General Attorneys Building.

"GENTLEMEN:

Herewith citation No. 9181, in the suite of City National Bank vs. El Paso & Northeastern R. R. Co. et al. for damages in the sum of \$10,001.18 for alleged loss on shipment of cattle to Kansas City,

which was served on Mr. W. S. Dawson, agent at El Paso, at 3.15 p. m. this date.

For your attention.

Yours truly,

H. J. SIMMONS,
General Manager.

Incl.

Cy Mr. Hawley:

Mr. A. L. Hawley:

Please furnish Messrs. Hawkins & Franklin all the information in your possession.

H. J. SIMMONS."

A. C. JOBES, a witness for the plaintiff, testified by deposition on the 30th day of November, 1914, at Kansas City, Missouri, as follows:

102 My name is A. C. Jobes. I am fifty-seven years of age, reside in Mission Township, Johnson County, Kansas, and am Vice President of the First National Bank of Kansas City, Missouri. I was connected with said bank on the 27th of October, 1911, as Vice President, and am now connected with the same bank in the same capacity. There was a draft drawn, by the City National Bank of El Paso, I think, upon the Peters Commission Company, in connection with this shipment, for Fifteen Thousand, Eight Hundred One Dollars and Eighteen cents. Our books, however, show no record of this draft, for the reason that the only record we keep of collections is made upon the letter transmitting the item to us for collection, and this letter was, at the request of the City National Bank of El Paso, returned to them, February 6, 1912. I do not know what sum has been collected by the City National Bank of the moneys advanced by it, if any, in connection with said shipment. Previous to the shipment inquired about there had been other shipments of cattle from the City National Bank of El Paso, Texas, consigned to the First National Bank of Kansas City, Missouri, but whether or not the billing showed the consignment to be in care of the J. P. Peters Commission Company I do not know. Neither do I know just how many shipments there were, as the letters of transmittal, upon which the record was made, have probably been destroyed. But I should say there were not less than three, and possibly five or six such shipments. If the Railway Companies, or either of them, at any time gave notice to said bank that said cattle had arrived in Kansas City it was not brought to my attention.

103 For the purposes of this suit, it was agreed between Counsel for Plaintiff and defendants in this case that the El Paso & Southwestern Company was a railroad corporation at the time it issued the Bill of Lading herein, and for a long while thereafter: that at such time, and up to and including the year 1913, H. J. Simmons was General Manager at El Paso, Texas, of said corporation, and was General Manager thereof from October 1, 1911, up to and including the year 1913.

J. F. WILLIAMS: a witness for the Plaintiff, being duly sworn, testified as follows:

My name is J. F. Williams. I am Vice President of the City National Bank of El Paso; I was connected with that institution during the months of October and November, 1911, I remember the shipment of cattle in question, and the incidents concerning the same. I was connected with the bank at that time, and I handled the transaction myself. I know J. A. Peters. In the month of October, 1911, he had no connection with the City National Bank. He was not employed by the bank. In connection with the shipment in question he was assisting John T. Cameron in bringing the cattle out of Mexico, and did that part of the work, tallying the cattle, loading and getting bills of lading, and attending to the shipping. I think Mr. Peters brought me this bill of lading, and it was attached to a draft drawn on the J. P. Peters Commission Company of Kansas City, I think, that is my recollection. This is the draft. The draft and bill of lading were then forwarded by us to the First National Bank of Kansas City, Missouri. The draft was sent to the First National Bank of Kansas City with the instructions to release the cattle to the J. P. Peters Commission Company upon payment of the amount of the draft. That draft was never paid. The draft and bill of lading was later returned to us, the City National Bank.

Here counsel for the Plaintiff introduced and read in evidence said draft, which is as follows:

"842 cattle.

Shipped 10/27/11.

"El Paso, Texas, Oct. 28, 1901.

Customer's Draft.

City National Bank.

United States Depository.

"Pay to the order of the City National Bank of El Paso, Texas, \$15,801.18, Fifteen Thousand Eight Hundred One 18/100 Dollars, and charge to account of

J. A. PETERS."

To J. P. Peters Commission Co., Kansas City, Mo.

This is the letter of instructions that went with the bill of lading.

Here counsel for the Plaintiff introduced and read in evidence said letter of instructions, which is as follows:

"First.
K. C.

"City National Bank.

El Paso, Tex., 10/28, 1911.

Drawn on Peters Co. Co. Amount.....	\$15,801.18
	84
	<hr/> \$15,885.18

"Release cattle upon payment of draft; if refused when presented kindly hold and wire us.

CITY NAT'L BANK."

A portion of the amount involved was paid to the bank. I cannot give the exact figures of the amount paid but about \$5,000.00. We are suing for \$10,001.18, and none of that has been paid by any one.

Here counsel for the Plaintiff introduced and read in evidence the following agreement:

"In the District Court, 41st Judicial District, El Paso County, Texas.

No. 9181.

CITY NATIONAL BANK

vs.

EL PASO & SOUTHWESTERN COMPANY et al.

In this cause it is admitted of record that the defendants delivered the shipment of cattle involved in this suit to J. P. Peters Commission Company, of Kansas City, at Kansas City, Missouri, but
106 this admission is not to be construed as an admission by the plaintiff that the delivery was a proper delivery, or that it was a delivery to the First National Bank of Kansas City. It is further agreed that the cattle involved in this suit and delivered to J. P. Peters Commission Co. were, at the time and place of such delivery, of the value of \$25.00 per head.

T. A. FALVEY,

Attorney for Plaintiff.

HAWKINS & FRANKLIN,

Attorneys for Defendant."

Cross-examination:

I, suppose that, technically, John T. Cameron might be considered the owner of the cattle in question; the bank had advance- the full purchase price of the cattle. These cattle were being moved to Kansas City to market. The arrangements between the bank and Mr. Cam-

eron were: Mr. Cameron was buying cattle in Mexico at that time and was being supplied in Mexico by a bank in Chihuahua for the purchase price of the cattle, they consigned the cattle to the City National Bank of El Paso, Texas, with the draft attached for the amount, or a letter of instructions to collect a certain amount. After they came over on the American side, clear through the custom house and delivered to us, we then refunded or advanced to the Chihuahua bank the amount they had advanced on the cattle; then we took the transaction over from Mr. Cameron and advanced the money to pay them back and shipped them to Kansas City for sale. We had no arrangements for anybody to handle them for us in Kansas City. J. A. Peters is a son of J. P. Peters of the J. P. Peters Commission Company, he was working with Mr. Cameron, I think, as a cattle buyer at that time, a sort of employee of Mr. Cameron's. He looked after the shipping of the cattle, tallying and loading the cattle for us. We had no arrangements with Mr. Peters, he was working with Mr. Cameron, Mr. Cameron was the man supposed to be looking after the cattle. The cattle were loaded into the cars under a release and then billed out under our instructions; I did not personally go down to the railroad office to ship them. No one from the bank personally went and looked after that. There had been quite a number of these shipments to this particular one, and Mr. Peters had looked after all or nearly all of them. I knew that he had been looking after the shipments, yes, sir. We presumed that he was shipping these cattle to Kansas City and that they were being handled there by the J. P. Peters Commission Company. On the other shipments the returns had been made to us prior to delivery, so far as we knew, we did not know that they had been turned over to the J. P. Peters Commission Company and then returns made to us. We knew that these cattle were being handled by the J. P. Peters Commission Company. Prior to the shipment of any of these cattle we had not looked up the financial standing of the J. P. Peters Commission Company; we did not know about that and made no inquiries about it. I think we had some correspondence with the bank about the J. P. Peters Commission Company, I don't know just in what particular, but we had written to the bank in connection with these shipments several times. I do not recall that the bank informed us that they were worth a good deal of money. I had not been making inquiries about that except in a general way, I don't think we had any knowledge that they were financially strong, in fact, if anything, to the contrary, I knew that J. A. Peters was the son of J. P. Peters, head of the J. P. Peters Commission Company, and we knew that these cattle were being delivered to the J. P. Peters Commission Company on payment of the drafts. I do not recall that on October 9, 1911, prior to this shipment, we had a letter from the First National Bank of Kansas City with reference to the J. P. Peters Commission Company in which they informed us that the J. P. Peters Commission Company was worth something like thirty-six or forty thousand Dollars, and they were pretty good people to sell cattle. I do not remember that Mr. Jobs wrote us to this

effect: "He is a good judge of live stock, and our friends are of the opinion that if a consignment of live stock should be turned over to him under promise to dispose of the property and deposit proceeds, that he would carry out in good faith, the undertaking, but nobody seems to know just what his financial responsibility is." This was the last shipment of the Mexican cattle, and up to that time we had received, so far as I know, the returns on the former shipments. It seems to me we were handling these cattle probably for several months, probably four or five months prior to that time, I cannot say positively, but we handled a good many train loads of cattle, under the same arrangements, and I presume that they all went to the

J. P. Peters Commission Company eventually, I advanced the
109 money to John T. Cameron on these cattle and sent them on to Kansas City. Well I don't know, we didn't know whether they were to be sold on the market in Kansas City or not, the presumption was * * * but we had no understanding, they were to be delivered when we got the money. It was John T. Cameron's look out if he could not pay until he got the money from the sale; we had the cattle and we were supposed to get the money. We knew somebody had to take them from Mr. Cameron. I did not know that they necessarily had to be sold before Mr. Cameron or anybody else could remit the money to us, somebody might have sufficient money before they were sold. I had no individual in mind that might pay for them before they were sold. I want to make this statement as to whether or not as a matter of fact we knew that in all probability the cattle would have to be sold before the money was paid and sent thro bank to us; the only security we had in advancing the money on those was to ship to somebody we knew to be absolutely responsible, which was our bank in Kansas City. The bank was instructed to deliver the cattle when the draft was paid. We did not have any agreement or arrangement with the First National Bank of Kansas City, whereby the bank was to pay us this draft before the cattle were sold. I did not know these cattle would have to be sold before the money would be turned into the bank to remit to us. I would say that that would not be true. I do not say that we had any arrangements with anybody to pay this draft before these cattle were sold. We were not interested in who or how the draft

was to be paid as long as they were in our possession; they
110 were not to be delivered until the draft was paid. It was up to Mr. Peters to get the money and pay the bank, or somebody. It was our understanding that Mr. Peters was to handle these cattle after they got to Kansas City, and get the money and pay into the bank. I did not understand that Mr. Peters would have to have possession of these cattle in order that he might handle them in that way. We did not rely upon Mr. Peters getting the money for these cattle and turning the money in to the First National Bank, we relied upon somebody paying the bank the money before the cattle were delivered. Nobody had a right to sell the cattle until they were released, and nobody could release them, according to our idea, until the money was paid; that was exactly the understanding. We had no arrangements whereby anybody would furnish the money before the

cattle were sold. We have no knowledge to the contrary that a single one of these shipments, prior to this particular one, in which the money was paid over to the First National Bank before the cattle were sold, we presumed that all of it was, we always got our money. We were allowing Mr. J. A. Peters to bill them out for us and look after getting them up there, and we knew that somebody had to make some arrangements to get the money to pay for them after they got there. There was nobody else that went up there that was concerned about them except Mr. Peters and the J. P. Peters Commission Company, except the bank was our agent. We did not expect the bank to get out and sell them, we expected somebody outside of the bank to handle them. I do not remember that we had arrangements 111 with Mr. Peters or Mr. Cameron, or both of them, by which they could move the cattle on to St. Louis if the market was bad in Kansas City, or if it looked better there. I think there was one shipment that the destination was changed at one time under our order, I am not sure; I think possibly there was one shipment. I do not remember that this billing was with the privilege of St. Louis. We sold most of the cattle in Kansas City. I presume that it would have been possible to change the destination to St. Louis, I don't remember whether we did or not.

Redirect examination:

In this case we did not have St. Louis in view. Our interest in these cattle was simply that they were sent here on a draft from a bank in Chihuahua, and we advanced money to the extent of the draft and the cattle were turned over to us, and we billed them to the First National Bank of Kansas City for the purpose of collecting that money if they were delivered to anybody. The cattle were in our possession here and billed out by our order to Kansas City. We were the consignors. These cattle left here on the 28th of October, and it was about the 4th or 5th of November not having received payment on the draft we telegraphed to the Kansas City Bank and asked it is had been paid and the cattle delivered, and they wired back that the draft had not been paid, that the parties claimed the cattle had not arrived. I never saw, prior to the time that we drew this draft and sent this bill of lading to the First National Bank of Kansas City, another writing regarding this shipment from the railroad company. Our purpose in shipping these cattle to Kansas City with the bill of lading ourselves as consignor and the First National Bank as consignee, was to collect the 112 money, to get back the money we had advanced on the cattle.

We were not interested in what J. P. Peters Commission Company did with the cattle so long as they paid the money to the bank; I presume they proposed to sell the cattle to somebody as commission merchants. A draft was drawn on the J. P. Peters Commission Company by young Peters, and that was attached to the bill of lading, and the bill of lading was to be delivered when the draft was paid; that was the instruction that went with the draft. They were cattle brokers, and what arrangement they might

have as to what to do after it was paid, or where they were to get the money, we had nothing to do with that.

Recross-examination:

Under our arrangement with the First National Bank they had the authority to release these cattle on payment of the amount. It was not up to them whether they collected it or not. If they had defaulted in the matter we would have had an action against them, they were responsible; our instructions were to release them on payment of the draft. They were acting for us in the matter as collecting agent.

Plaintiff rests

JOHN F. WAITE, a witness for the Defendants, testified by deposition on the 30th day of November, 1915, as follows:

My name is John F. Waite, I lived in Kansas City, Mo. in October, 1911. I was office manager of the J. P. Peters Commission Company at Kansas City. I am familiar with the handling

113 and disposition of the cattle in question at Kansas City.

Previous to the time of this shipment there had been other shipments from the City National Bank of El Paso, to Kansas City. I could not tell how many unless I referred to the record. There had been quite a number of shipments, however. A representative of the bank had been in our office or place of business the day these cattle arrived. He was a collector. He had been there at other previous times with reference to drafts on shipments. The draft is made out here and sent to the First National Bank of Kansas City for collection, and they send their man down to the stockyards with this draft for collection; the draft is taken up by check and the collector goes back to town. He was there the day before this shipment came in, he did not ask anything about these cattle, I told him the cattle were not in yet. He was there the next day, the cattle were then in the pens, and I told him the cattle were not sold. They were in the pens of the J. P. Peters Commission Company. I did not tell him they were in the pens of the J. P. Peters Commission Company. Nothing was said by him with reference to that matter. I suppose the cattle were sold in the course of a half hour after he left. These cattle were down there when the collector of the First National Bank of Kansas City, Missouri, came down and asked me about them the last time, and I told him they were in the pens. He gave me no instructions about how to handle them. I know John T. Cameron. We carried the account as the Cameron Cattle Company. We make a record of the sale of these cattle; and we take a carbon copy of that record. This is

114 the record of that sale, and it is correct. The original was sent to Cameron at El Paso. That record shows that the cattle were sold and brought \$24,557.23, and after deducting expenses, commission, it shows a net credit of \$20,260.99 in favor of the Cameron Cattle Company. I was general manager of the business in charge. The City National Bank is the consignor named in all

of these way-bills. The previous shipments were delivered to the yard man of the J. P. Peters Commission Company. The collector of the First National Bank did not know of the delivery of the previous shipments, nor did the bank. Nothing was done by the bank with reference to the previous shipments with reference to whether they were paid any sums of money arising from their sale. The Commission Company paid drafts at the bank drawn against them on previous shipments, commencing October 4th; as I said before, the bank in El Paso would send the draft to the First National Bank of Kansas City for collection, they would send it down to the office of J. P. Peters Commission Company, and we would issue them a check to take up the draft. The drafts were always drawn against the J. P. Peters Commission Company, and on the previous shipments sold the drafts had been paid to the bank. In this particular instance the draft was not paid. The way-bills on all the shipments had the same consignee and person in whose care they were shipped, and delivery on all was exactly the same to J. P. Peters Commission Company. At that time and at the present time Kansas City is a large cattle market, and they have big stockyards there where incoming cattle are taken and sold to purchasers.

115 There is a general custom with reference to how these cattle are handled after they reach Kansas City, as to whether they are handled on the way-bill or otherwise. Business men, bankers, and others dealing in cattle know of the custom and manner of handling cattle after they reach Kansas City. I know how way-bills are made out on which cattle are handled. There had been seven shipments on the 4th, 5th, 7th, 11th, 13th, 23rd, and the 27th. Those shipments were preceding this. On all the previous shipments, before the cattle were sold and delivered, after reaching the Peters Commission Company, they had taken up and paid a draft drawn against the Commission Company through the First National Bank of Kansas City. In some cases the draft did not get there before the cattle; in those cases the draft was held until the cattle were entered and sold. In those instances in which the draft reached there before there was a sale, the draft had not been taken up and paid before the cattle were delivered to the purchaser. I have not stated that they would come down with the draft and before the cattle were sold and delivered that the company would give a check for the amount that was represented by that draft drawn by the City National Bank on the First National Bank. If the cattle came first and were sold, when the draft was presented we paid it, if the draft came before the cattle were in the yards, they would hold the draft until the cattle were sold. I did not make these entries, the bookkeeper did, but they were made under
116 my direction, and they are correct because our books balanced at the first of the month; that is the reason I know that they are correct. I was the general manager of the business and in charge, and in due course of my business sales were reported to me and put on our books. The first shipment was October 4th, 1911. The shipment in question reached us about the 30th of October. This is a way-bill of a shipment dated El Paso October

27, 1911, the shipment in question that reached us about the 30th. It says on the way-bill, but that is not the only way I know that. The City National Bank is the consignor named in all of those way-bills, and the First National Bank of Kansas City is the consignee, care J. P. Peters Commission Company. I am familiar with the way shipments of live stock at the Kansas City stock yards at that time were handled, with reference to whether they were handled on the way-bill or on the livestock contract; they were handled on the stubs from the original way-bills. The live stock contract was issued to the shipper, and the shipper used it as transportation both to and from the market. These cattle were handled at the Kansas City stockyards on the stubs of the way-bills. I know how the way-bills and stubs of way-bills are made out. They are made out by the agent of the railroad company. I have had experience with contracts between shipper and consignee, the way-bill has no contract on it at all, of the agreement between the shipper and the carrier. In the shipping of a lot of cattle there is a contract made between the railroad company and the shipper, and in the contract there is a consignee at the place of destination, when that is executed the railroad takes one and the shipper takes one—it is executed in duplicate. The way-bill is then made out by the railroad company. The way-bills in each of these instances were just the same as this shipment of the 27th; the consignor and consignee are the same.

J. A. PETERS, a witness for the defendants, testified by deposition on the 30th day of November, 1915, as follows:

My name is J. A. Peters. I am in the cattle business. In October 1911 I was working for the J. P. Peters Commission Company, Kansas City, Missouri. J. P. Peters was the sole owner of that business. I am a son of J. P. Peters. I was connected with the shipment of cattle in question. The cattle came from the Santa Clara ranch in Mexico. The legal title to the cattle at the time they were shipped out of here, was in the City National Bank. John Cameron bought them in Mexico and shipped them out. It was thirty-five or forty days before October 27th that he bought them. They came up here from Mexico, having been purchased by Mr. Cameron consigned to the City National Bank of this City. That is what I mean by "Legal title," that they were consigned to the City National Bank here. When they reached El Paso they were handled in the Southwestern stockyards, fed, watered and entry made at this port. I took charge of them on behalf of the City National Bank when they reached here and have them handled. They were handled in public stockyards, which serves the public generally. I took charge of them not only at the instance of the City National Bank but also of Mr. Cameron and the Peters Commission Company of Kansas City. I had charge of them down there in the stockyards. I do not know how long they remained there before being shipped out, it took two or three days to get them released and forwarded on. I signed all the contracts and looked after that, and all the shipments we had. I signed the livestock

contract under which the cattle moved out of here as agent of the City National Bank. I signed it City National Bank by J. A. Peters. I had been handling all of those shipments, this was one of numerous shipments. This is the contract which I executed, that bears dated October 27th. These are the way-bills issued by the El Paso & Southwestern System, dated October 27th, 1911, under which the cattle in question moved. It appears in those way-bills that the cattle were consigned by the City National Bank to the First National Bank of Kansas City, care of J. P. Peters Commission Company. I billed them that way. As to whether I directed the clerk of the railroad that issued the bill of lading to bill them that way, that is the billing, I gave the clerk of the railroad, that issued the bill of lading at the joint warehouse. I think I gave the agent the directions, with reference to the shipment, at the same time the contract was executed. My recollection is so, undoubtedly so. When I executed the contract I directed the agent how to bill. I directed him to bill care of the J. P. Peters Commission Company. I don't remember exactly but I should judge that was about the eighteenth or twentieth train of cattle that we had handled from Mexico consigned by the City National Bank to the First

119 National Bank of Kansas City about that time. Practically all of those shipments were handled under the same agreement between Mr. Cameron and the City National Bank and myself. Those shipments were made before the shipment in question, right up to two or three or four trains a week, up to the time of this shipment. Prior to the date of this shipment I had been handling these eighteen or twenty shipments at the rate of about three or four trainloads a week. I do not remember if I took the contract under which these cattle moved after I had executed it; I might have taken the contract at that time, or they might have called a messenger, and had it sent up to the bank, we bill the cattle out, but we don't get the contract until after the cattle are loaded, so they can put the car numbers on them. It was customary at that time, if I had time, I went down and got the duplicate contract myself, but if I was busy I sent a messenger. This contract was sent to the City National Bank and attached to draft drawn on Peters Commission Company Kansas City. After I had given directions about the way-bills and the contracts had gone to the bank I signed the draft to which the duplicate contract was attached. I had nothing else to do with it, after the cattle left town I had nothing further to do with it. I do not remember when the bank here first talked to me about the matter of the draft not being paid; I think it was the sixth or seventh day after the cattle left here. I think the City National Bank made demand on myself on the J. P. Peters Commission Company and on Mr. Cameron for the payment of the amount of that draft that had been drawn against the cattle at that time, I know they did on

120 the J. P. Peters Commission Company. They demanded payment of the draft. The draft represented the cost in Mexico, less the United States duties at this port; Mr. Cameron loaded the cattle in Mexico and drew on the City National Bank for the cost of the cattle when the cattle arrived here the J. P. Peters

Commission Company paid the American duties on the cattle, and on account of that equity in the cattle the City National Bank handled the purchase price in Mexico. The draft was for the cost of the cattle in Mexico, the freight and feed charges followed the cattle to Kansas City. Mr. Cameron drew on the bank of Sonora when the cattle were purchased, and they drew on the City National Bank. The import duty was not paid by the City National Bank. After the cattle had moved into Kansas City and about seven days after the execution of this contract, the City National Bank made demand for the payment to them of the amount of this draft. The only interest the City National Bank had in the cattle was the fact that they had advanced this money. In response to that demand I gave the City National Bank security to secure the indebtedness represented by that draft; that security consisted of a house and lot in Kansas City. I don't remember just how the account stands now, but one time last fall, as I remember, Mr. Williams said about \$5,000.00 had been paid on the amount of the draft. I know that Mr. Cameron has had some business with the bank since that time pertaining to this account but I don't know just how it stands. There is an agreement between him and the bank. A mortgage and deed of trust still exists to secure to the City National Bank the payment on my property in Kansas City. The first shipments of the eighteen or twenty were not consigned to the First National Bank care J. P. Peters Commission Company like this shipment was; I do not remember just how many were, but several shipments previous to this one were consigned the same way as this shipment. I know the reason the cattle going to Kansas City were consigned to J. P. Peters Commission Company in this particular case; I might explain that better by an illustration of one shipment that arrived there during the night in very poor condition, and being billed to the Bank, we could not get the cattle released until the bank opened in the morning, and by the time we got back from the bank with the bill of lading, it would be about 9:30, so that by the time we got possession of the cattle and fed and watered them, the day's market would be over. That happened during the fore part of the shipments. Subsequent to that time the way-bills were changed so as to send them cars of J. P. Peters Commission Company.

Cross-examination:

I do not remember that the City National Bank ever instructed me to bill these cattle in care of the Peters Commission Company. They never did that I remember of. I had no authority to sell the cattle without handling them for the City National Bank, we sold numerous shipments here. We were handling them as brokers, we got our commission whether we sold here or in Kansas City. I had no authority to give bills of sale, execute any bills of sale myself for those cattle. I do not remember that the City National Bank authorized me to bill these cattle care of the Peters Commission Company instead of to the First National Bank of Kansas City. I do not remember of ever talking to them

about it, or telling them that I had done it. I would not want to swear either way. I think that the cattle were entered at this port by the City National Bank but the J. P. Peters Commission Company furnished the American duties. I know that of my own knowledge. My interest in the cattle was merely an equity and the City National Bank had title and possession and claimed the cattle until their money was repaid to them, and it was the understanding that I had no right to release those cattle from the possession and ownership of the City National Bank by anything that I did until they were first paid for.

JOHN FOX, a witness for the Defendants, testified by deposition on the 30th day of November, 1915, as follows:

My name is John Fox. I am the livestock agent of the Rock Island Railroad. In 1911 I held the same position, and at that time lived in Kansas City, Missouri. I am familiar with the Kansas City stockyards. I am familiar with the method and manner of handling cattle in the Kansas City Market. I am familiar with the general custom of handling of cattle on that market as to their delivery and as to whether they were delivered on the way-bill or on the live stock contract. I was familiar with that custom at that time. It was the custom to deliver cattle at the stockyards on the way-bill stubs; the contracts were not used. None of the carriers knew anything about the contracts; the receiving agents of
123 the carriers rarely, if ever, know anything about the contract until surrendered to them or offered to be surrendered to the receiving agent, for the *purport* of obtaining return transportation for the caretakers. That custom was not limited in any manner, generally known to be the custom. As traffic representative of the Rock Island Lines I was familiar with the cattle being moved and was always advised of the dates they were moved, but outside of that I knew they came and were delivered to the yards, but did not know anything about the class of cattle, or how they looked, I do not recall that I ever saw them. By "Rock Island Lines" I mean the Chicago, Rock Island & Pacific. In all of my testimony I refer to that.

Cross-examination:

I could not say that this custom was known to the First National Bank of Kansas City. When the railroad company delivers to the stockyards the railroad company looks to the stockyards company to reimburse them for any freight charges and any other charges that may be against the cattle. The railroad company does that without regard to who they are consigned to; they deliver them to the stockyards company and take them out without regard to who they are consigned to. When a shipment of cattle comes to Kansas City the railroad turns them over to this stockyard company without regard to whom they may be consigned. It is my understanding that the stockyards company is bound to the railroad company to see to proper delivery.

124 Redirect examination:

The shipments of livestock are delivered to the Kansas City stock yards company of Missouri under waybills, or stubs; those way-bills, after the animals are checked out, counted and verified and delivered to the pens of the consignee, are then returned to the local freight agent's office in the building, who revises the freight charges, looks the bills over, revises the charges, corrects them if necessary, for any error in expenses or rates, and after this correction is made, if any, the stubs are then returned to the stockyards company, and they make collection after the way-bills have been revised by the local livestock agent, representing the carrier who handled the business into market. The shipment of October 27th was handled in delivering on original waybill, and the previous shipments were handled in the same manner; there may have been a few handled with stub bill. All of them were either handled with the original way-bill or the stub of the way-bill. At that time it was the generally known custom in Kansas City to handle the live stock there that way. They were handled that way because that was the only means of delivery to the stockyards; these way-bills accompany the shipment by the crew, or the conductor turns these bills over to the yardmaster's office, and they are handed to the foreman of the switch crew which handles the stock to the stockyards. That bill is handed to the stockyards representative to make delivery. The live stock contract is retained by the shipper for transportation purposes. That was the generally known custom. I could not say whether that custom was known by the First National Bank.

E. F. REESE, a witness for the Defendants, testified by deposition on the 30th day of November, 1915, as follows:

My name is E. F. Reese. I live in Kansas City, Missouri, and did in 1911. I am personally known as Local Livestock Agent at Kansas City Stockyards for the Chicago, Rock Island & Pacific Railroad. In 1911 I was holding this position. I knew of the shipment of October 27, 1911, in question, and I knew of the previous shipments inquired about. The shipment of October 27th was handled in delivering on original way-bill, and the previous shipments were handled in the same manner; there may have been a few handled with stub-bill, but all of them were either handled with the original way-bill or the stub of the way-bill. The live stock contract is retained by the shipper for transportation purposes, and that custom was generally known. I cannot say whether that custom was known to the First National Bank. I do not know whether that custom was known to the City National Bank of El Paso, or the First National Bank of Kansas City. I know that the City National Bank had previous shipments that were handled under that custom. They had had previous shipments which were handled on the way-bills at the stock yards. The previous shipments had been consigned in the way-bills to the First National Bank care J. P. Peters Commission Company. The J. P. Peters Commission Company knew of that custom. I handled all the way-bills for all live stock

coming into the Kansas City stockyards, and it was by virtue of that portion that I know that shipments for the City National Bank were handled on those way-bills. I was billing on the stock, that is, the billing that accompanies the shipment to its destination. My only information as to what the City National Bank had done at any time was from the billing instructions. My information was gained by the way-bills. That was the only evidence I had of it. Without the way bills we would be unable to deliver the stock.

ED. W. JARVIS, a witness for the defendants, testified by deposition on the 30th day of November, as follows:

My name is Ed. W. Jarvis. I live in Louisville, Kentucky, working for the L. & N. Railroad. In October, 1911, I was living in El Paso, Texas, working for the El Paso Transfer Station, commonly known as the Joint Warehouse. I was bill clerk in 1911, and had been from some time in the last of September or the first of October. This is a livestock contract of the El Paso & Southwestern system, with the City National Bank as consignor, and the First National Bank of Kansas City as consignee. The pink paper is a duplicate or carbon copy of the original. The white paper is the original.

Here counsel for the defendants introduced and read in evidence the original and duplicate contract under which the shipment of cattle in question moved, duplicate of which was heretofore introduced by plaintiff and copied in full in this statement of facts.

127 These twenty-eight sheets are El Paso & Southwestern way-bills, covering shipments of cattle from El Paso, Texas, to Kansas City, Missouri, from the City National Bank, consigned to First National Bank of Kansas City, Missouri, care of J. P. Peters Commission Company, privilege St. Louis, Missouri, dated October 27, 1911.

Here counsel for the Defendants introduced and read in evidence said waybills, which are attached hereto and made a part of this statement of facts, and marked Exhibits 4 to 31, inclusive.

J. A. Peters issued the billing instructions on those cattle. His instructions were the cattle were billed from the City National Bank to the First National Bank of Kansas City, Missouri, care J. P. Peters Commission Company. J. A. Peters signed the live stock contract on behalf of the City National Bank; he signed the City National Bank by himself, J. A. Peters. There had been previous shipments during the month of October on which Mr. Peters had given me billing instructions. These fourteen documents on blue paper are way-bills issued on the El Paso & Southwestern system, under date of October 4, 1911, from El Paso to Kansas City, Missouri; these shipments were delivered on Mexican Central transfers and shipments handled through the Joint Warehouse, and consigned to the First National Bank of Kansas City, Missouri, care J. P. Peters Commission Company. These shipments came in here consigned to the City National Bank from Mexico; we are supposed to show all that on the billing, this is a little different from the other.

128 Here counsel for the Defendants introduced and read in evidence said way-bills, dated October 4, 1911, which are attached hereto and made a part of this statement of facts, and marked Exhibits 32 to 45 inclusive.

These ten documents on blue paper dated October 5th, 1911, are way-bills on the El Paso & Southwestern System, billed from El Paso, Texas, to Kansas City Missouri, City National Bank of El Paso to First National Bank of Kansas City, care J. P. Peters Commission Company.

Here counsel for the defendants introduced and read in evidence said ten way-bills, dated October 5th, 1911, which are appended hereto and made a part of this statement of facts and marked Exhibits 46 to 55, inclusive.

These twelve documents are live stock way-bills on the El Paso & Southwestern system, all dated October 7, 1911, billed from El Paso to Kansas City, Missouri, from City National Bank of El Paso, Texas, to First National Bank of Kansas City Missouri, care J. P. Peters Commission Company.

Here counsel for the Defendants introduced and read in evidence said twelve way-bills dated October 7, 1911, which are appended hereto and made a part of this statement of facts and marked Exhibits 57 to 67 inclusive.

These twelve documents are live stock way-bills on the El Paso & Southwestern System, billed from El Paso to Kansas City, Missouri, dated October 11, 1911, delivered to Joint Warehouse on Mexican Central transfer, this information is shown in consignor's column, to the First National Bank of Kansas City, Care J. P. Peters Commission Company.

129 Here counsel for the Defendants introduced and read in evidence said way-bills dated October 11, 1911, which are appended hereto and made a part of this statement of facts and marked Exhibits 68 to 79 inclusive.

This bunch of papers you hand me are live stock waybills on the El Paso & Southwestern System, all dated October 13th, and October 23rd, 1911, billed from El Paso to Kansas City, Missouri, delivered on Mexican Central Transfers, information in consignor's column, billed to First National Bank of Kansas City, Missouri, care J. P. Peters Commission Company.

Here counsel for Defendants introduced and read in evidence said way-bills, dated October 13th, 1911 and October 23rd, 1911, which are attached hereto and made a part of this statement of facts, and marked Exhibits 80 to 137 inclusive.

I wrote those way-bills at the direction of J. A. Peters *that* ones that are billed from the City National Bank; those delivered on transfers were handled like regular freight from the joint warehouse on the transfer. I mean by that any freight moving from Mex'co

came through the transfer, and if charges are not paid at the border they go, on through and we re-bill it. I was asked by Mr. Peters to way-bill certain of these cattle to the First National Bank of Kansas City, Missouri care J. P. Peters Commission Company. That applies to all of the shipments.

Cross-examination:

I was bill clerk in the Joint Warehouse. At that time the Joint Warehouse was under the jurisdiction of the Santa Fe Railway. I was not directly under the employ of the defendant railway company. I was employed in the joint warehouse, under the supervision of the Santa Fe.

Redirect examination:

The joint warehouse is a company entered into by all the American Railroads running into El Paso for the business of handling Mexican freight, inbound and outbound to Mexico, and to handle bonded business in the City of El Paso, that means local freight in bond. The shipment of cattle in question originally came from Mexico to El Paso and was considered as joint business. It was the business of the employees of the joint warehouse to execute contracts for moving shipments of this character over the various lines entering El Paso; we did that for them. We were authorized by the railroads entering El Paso to issue contracts, bills of lading and way-bills of this character for all roads.

U. S. STEWART, a witness for the Defendants, was sworn and testified as follows:

J. A. Peters issued the billing instructions on the cattle in question. The cattle were billed from the City National Bank to the First National Bank of Kansas City; those were the instructions in reference to the way-bills on the cattle.

J. C. WALLWORK, a witness for the Defendants, being duly sworn, testified as follows:

My name is J. C. Wallwork. I am joint agent at the joint warehouse in El Paso, Texas. I was joint agent in October, 1911. I know E. J. Jarvis. He was bill clerk at the joint warehouse at that time. This is a live stock contract issued covering this train of cattle dated October 4th, 1911, the shipper being the City National Bank by J. A. Peters, to the First National Bank, Kansas City.

Here counsel for the Defendants introduced and read in evidence ten duplicate live stock contracts, which are appended hereto and made a part of this statement of facts, and marked Exhibits 138 to 147 inclusive.

I know J. A. Peters. I have known him several years, ever since he began shipping through the joint, either in 1910 or 1911. He

did a good deal of shipping of cattle. I recall a series of shipments by the City National Bank here to Kansas City, the First National Bank of Kansas City along in October, 1911. I have no recollection of having a conversation with Mr. Peters concerning the shipment of October 27th, 1911, before the shipment was made, but I have after it was made. I did have a conversation with him in regard to that last shipment.

Cross-examination :

A bill of lading precedes the way-bill. After the execution of the bill of lading then comes the way-bill. The bill of lading always precedes the way-bill. Way-bills are for carrying freight, for the enlightenment of the conductor, for the conductor to know what he has on his train. In other words, we make up a train load of cattle 132 and execute the bills of lading and then we issue our way-bills, and deliver those to the conductor; when he gets to a terminal he passes those along until they reach their destination. That is the purpose and object of way-bills. The shipper does not sign the way-bills; he has nothing to do with them. They are for the use of the railroad company. Nobody has possession of the way-bills except the conductor of the railroad. The shipper or agent accompanying the shipment does not have the way-bills, and no duplicate is issued. There is only one original and that is carried through by the conductor until they reach their destination. The caretaker has no connection with the way-bills, or should not have; I suppose in the caboose they probably look at them sometimes. Way-bills should be made out in conformity with the bills of lading or shipping contracts, unless sometimes the contracts are made and then they come around and ask you to add something on there and in your hurry the billing clerk is liable to forget to put it on the other; that has been known in several cases. Of course, it is an oversight of the railroad if they fail to put that on the contract. I was joint agent for the four lines here in El Paso, viz: The Santa Fe, the G. H. & S. A., Texas & Pacific and the E. P. & S. W. system. I did not see these bills of lading at the time they were issued. I did not talk to Mr. Peters at the time they were issued, I talked to him on several shipments. In this bill of lading the consignor is the City National Bank, and consignee First National Bank. Our way-bills make them consignee care Peters Commission Company.

That is not on the bill of lading, that was an oversight there. 133 If all the others are just the same way it is an oversight. I don't know about the office being loosely run. I did not check them, I did not see them. I do not know how many there were. Every way-bill is issued after the bill of lading, the contract is made first, when the cattle are loaded and they get the car numbers, they bring the car numbers in there, and then the billing is made from the memorandum of the car numbers. We put the car numbers in the bill of lading, and that follows the issuing of the shipping contract.

J. F. WILLIAMS, a witness for the plaintiff, being recalled testified as follows:

Redirect examination:

I testified that I had charge of these shipments of cattle for the City National Bank. I never at any time instructed J. A. Peters to execute or instruct the railway company to execute for the City National Bank way-bill consigning the cattle or any of the shipments of cattle to the First National Bank care J. P. Peters Company. I did not know at the time those way-bills were issued, or at any time prior to the shipment involved was shipped, that those way-bills had any shipping directions to J. P. Peters Commission Company, or that any of the bills of lading that were presented to me by J. A. Peters covering this or previous shipments, had that clause in them. I don't recollect seeing any with that clause in it. I would not have accepted any with that clause in it. We shipped the cattle with bill of lading directed to the First National Bank, draft attached, because we had advanced money on these cattle, we thought we would consign them to a reliable institution representing us, and we thought they would collect the money, and we would get our money back.

Recross-examination:

I think there were some of these same Cameron cattle that were forwarded by others than Peters for the City National Bank, but I only know that from seeing the bills. I do not know a man named Simmons. I do not know a man by the name of Davis that was working there with Peters in the matter. Cameron had several men working for him, I don't remember his name. I do not know that there were some shipments made that were not billed out from the joint station but billed out from the station over here of the El Paso & Southwestern; we handled a good many cattle at that time, I don't recollect. In every instance I got a copy of the live stock contract, according to my recollection. At any time we advanced money on cattle we did, we might have handled some collections without the bank advancing the money, I don't remember about that. I got all the contracts that were made by Peters covering these shipments, on every case we had advanced any money; that was our only way to reimburse ourselves. I understood or knew in those shipments that some one, a caretaker, went along with the shipments. All I know about Leslie Hunt being one of the care takers is from the statements that have been made here. Having received the contract understood, of course, that some one would go with them. It was customary that somebody would have to look after the cattle. I do not know Leslie Hunt personally. I do not know where he is now. After I failed to get a prompt remittance, or any remittance from this shipment of cattle I made demands on J. P. Peters Commission Company for the money, and I went there personally to see them at Kansas City. I had a talk with Peters

and he told me he did not have the money, I told him that they were our cattle. I did not make a settlement with him. I took a mortgage on some property of J. A. Peters to cover it, as maker of the draft. It was an attempt to protect ourselves with anything we could get. There was a payment made through John T. Cameron through a Fort Worth Company, the difference between the amount of the draft, and the price claimed, so far as I know it did not come through Peters. It was paid on that account; you see we were dealing with Cameron here, he had some kind of cattle contract, or agreement with a concern in Mexico to sell him a certain number of cattle, and for a certain amount, my recollection is, he turned that over to a Fort Worth concern and they paid him some \$5,000.00 for the contract, which he turned over to us. The Peters Commission Company was not handling the cattle from Juarez to El Paso; there seems to be a confusion about that, it was John T. Cameron. Peters Commission Company was buying them after they got to Kansas City, our dealings with entirely with John T. Cameron. I don't know whether they really paid any of the charges in coming over here or not.

Redirect examination:

The amount, however, as stated in our petition, a little in excess of ten thousand dollars, is the amount due the City National
136 Bank; that is the amount outstanding, that has never been paid. That is the amount sued for and which has never been paid. This is the contract we had with Peters.

W. S. DAWSON, being recalled as a witness for the Defendants, testified as follows:

I stated yesterday that in October, 1911, I was agent here for the El Paso & Southwestern. This is a live stock contract covering six car loads of cattle from the City National Bank of El Paso, Texas, to the First National Bank of Kansas City, care Peters Commission Company, dated October 19th, 1911.

Cross-examination:

It is the first copy made with an indelible pencil. It looks like the one written on. It is marked here "duplicate." These contracts are always made in duplicate. It contains the provision that each one of those duplicates shall be considered as an original.

El Paso, Texas, Jan. 22, 1920.

It is agreed that in lieu of making copies of each of the waybills introduced in evidence by defendants, that each of said waybills pertaining to the shipment involved in this suit contains the following:

Name of Shipper:—City National Bank.

Name of Consignee:—First National Bank, Kansas City, Mo.
c/o J. P. Peters Commission Company,
priv. St. Louis, Mo.

137 It is also agreed that way bills of similar character and containing the same recitations with reference to consignor and consignee were introduced in evidence.

These way bills are referred to in Statement of Facts, Page 35, as Exhibits 4 to 31 inclusive; Page 36, as Exhibits, 32 to 45 inclusive; Page 36 as Exhibits 46 to 55 inclusive and 57 to 67 inclusive; Page 37 as Exhibits 68 to 79 inclusive, and Exhibits 80 to 137 inclusive, and this agreement is here inserted instead of the Exhibits above referred to and as referred to in the Statements of Facts, it being the intention of this agreement to let it take the place of all of the way bills referred to as having been introduced in evidence.

DYER, CROOM & JONES,
Attys., Attys. for Pltff.
DEL W. HARRINGTON.

Here counsel for the Defendants introduced and read said live stock contract in evidence, which is appended hereto and made a part of this statement of facts, and marked Exhibit 148.

We, the parties to the above numbered and entitled cause hereby agree that the above and foregoing statement of facts made up in duplicate, is a true and correct statement of all the facts admitted and of all the evidence introduced on the trial of said cause.

Witness our hands in duplicate on this the 22nd day of January, A. D. 1920.

DYER, CROOM & JONES,
Attys., Attorneys for Pltff.
W. M. PETICOLAS,
DEL W. HARRINGTON,
Attorneys for Defendants.

138 The above and foregoing statement of facts, made up in duplicate, having been submitted to me, and having been examined by me and found correct, and it appearing that the same has been agreed to in duplicate in writing by the parties to said cause the same is hereby approved as the correct statement of facts in the above styled cause in duplicate, and it is ordered that the same be filed as a part of the record in said cause this the 22nd day of January, A. D. 1920.

P. R. PRICE,
Judge 41st Judicial District of Texas.

Court of Civil Appeals, El Paso, Texas. Filed Jan. 24th, 1920.

J. I. DRISCOLL,
Clerk.

In the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas, at El Paso, Texas.

No. 1116.

CITY NATIONAL BANK OF EL PASO, TEXAS, Appellant,

VS.

EL PASO & NORTHEASTERN RAILROAD CO. et als., Appellee.

Statement of the Nature and Result of the Suit.

The City National Bank, of El Paso, Texas, as plaintiff, filed its amended petition on December 24, 1914, in the Forty-first District Court of El Paso County, Texas, against appellees, alleging that the plaintiff was a banking corporation doing business in El Paso, Texas, and that each of the defendants was a railway corporation doing business as common carriers, jointly operating a line of railway from El Paso to Kansas City, Missouri; that on October 27, 1911, the defendants agreed in writing to carry from El Paso to Kansas
139 City and there deliver to the First National Bank of Kansas City, consignee, 847 head of cattle of the value of Twenty Thousand Dollars (\$20,000.00), the property of the plaintiff, and in pursuance of such written agreement plaintiff delivered to the El Paso & Southwestern Company, at El Paso, for transportation, said cattle. Plaintiff further alleged that the defendants did not carry and deliver said cattle in pursuance of said agreement but so negligently acted in regard to the same that the said cattle were wholly lost to plaintiff and were not delivered to the consignee, to plaintiff's damage in the sum of \$10,001.18, and asked judgment against the defendants in the said sum. (Tr. 1, 2, and 3.)

The material allegations of the defendants' answer were that the plaintiff, acting through J. A. Peters, its agent, entered into a written contract with the El Paso & Southwestern Company for the transportation of said cattle to Tucumcari, New Mexico, enroute to Kansas City, to the First National Bank of Kansas City, the consignee in said special contract (Tr. 6) but that contemporaneously with the execution of said contract and immediately subsequent thereto, said Peters, acting for plaintiff, instructed and directed the initial carrier to deliver said cattle to the First National Bank of Kansas City, in care of the J. P. Peters Commission Company, and that in accordance with said instructions way bills were executed in writing covering said shipment, in which the name of the shipper was stated to be the City National Bank and the name of the consignee was the First National Bank, Kansas City, care of J. P. Peters Commission
140 Company (Tr. 7); that in accordance with the instructions of said Peters, the defendants acted upon said way bills and delivered said cattle at Kansas City to the J. P. Peters Commission Company (Tr. 8); that there existed at the time of this shipment at Kansas City and other points a well known and estab-

lished custom known to the plaintiff and its agents, that a livestock contract should be retained by the shipper's employees to serve as return transportation and that the delivery of the cattle should be governed by instructions contained in the way bill, and in addition thereto it was their duty to deliver the cattle in accordance with the instructions of the shipper's agent (Tr. 8); that the defendants received said shipping directions from plaintiff in good faith, which were indorsed on the way bills covering such shipment, and acted thereupon in the delivery of said cattle, and the failure of plaintiff to consign said cattle in said livestock contract in care of the Peters Commission Company constituted fraud on the part of the plaintiff or was the result of mutual mistake on the part of the plaintiff and defendants (Tr. 10).

That on divers dates from September 29, 1911, to date of shipment in question the plaintiffs shipped to Kansas City many shipments of cattle consigned to the First National Bank; that each of said livestock contracts covering the previous shipments was executed by the plaintiff through J. A. Peters, and that the way bills covering each stated the consignee to be the First National Bank of Kansas City, in care of J. P. Peters Commission Company, and that such billing was made in accordance with instructions of J. A. Peters and
141 each of said previous shipments were by the defendants delivered to the J. P. Peters Commission Company under the same circumstances as the shipment in question and without further notice to the First National Bank; that by its action in regard to said previous shipments the plaintiff induced the defendants to believe that the delivery to the J. P. Peters Commission Company was in full accordance with said contracts and way bills and was desired by the plaintiff, and acting upon the belief so induced and in accordance with instructions of the agent of the consignor, the delivering carrier delivered these cattle, as it had done the others, to the J. P. Peters Commission Company, all of which facts are well known to the consignor, and being plaintiff, and it is now estopped to question the validity and correctness of the delivery made in this instance. (Tr. 12.)

That the agent and attorney of the First National Bank of Kansas City was notified, on the date the cattle arrived, by the Peters Commission Company and that they had been delivered to the said commission company but had not yet been sold, and that the said agent and attorney assented and acquiesced in the possession of the cattle by the J. P. Peters Commission Company and did not object to the delivery to that company, nor demand their possession (Tr. 13), and by reason of the actual notice, knowledge and constructive notice that the cattle had arrived and that they were to be delivered to the J. P. Peters Commission Company and that — were delivered to that company, that thereby defendants were exonerated from any duty of further notice to the First National Bank of Kansas City. (Tr. 15.)

142 Plaintiff filed a trial amendment on September 10, 1919, in answer to the amended answer of defendants, alleging that the defendants issued and delivered the bill of lading of date October

27, 1911, without inserting in said bill of lading that the consignee should be the First National Bank of Kansas City, Missouri, care of J. P. Peters Commission Company; that it was through negligence of the defendants in permitting said bill of lading to be so issued and delivered to plaintiff without giving notice to it that there had been directions by J. A. Peters to bill said cattle to the First National Bank in care of J. P. Peters Commission Company, and had said bill of lading contained said directions plaintiff would not have accepted same, but accepted and received said bill of lading and relied thereon, without notice of said intentions, and relied on the same, and had said bill of lading contained said directions plaintiff would have notified said defendants not to deliver said cattle to the Peters Commission Company and by reason of their conduct and act in putting into circulation, issuing and delivering to plaintiffs said bill of lading without said instructions in care of Peters Commission Company thereon, said defendants are estopped to deny the same, its effect or validity, or to set up any undertaking or agreement with J. A. Peters. (Tr. 23.)

The cause was submitted to the jury on special issues (Tr. 24, 25, 26); and upon the verdict of the jury (Tr. 28, 29, 30, 31) the court entered a judgment in favor of the defendants (Tr. 31-34). In due time plaintiff filed its motion to set aside the finding of the
143 jury to special issues (Tr. 36-37) and in due time plaintiff's amended motion for a new trial was filed. (Tr. 38-44.)

On October 30, 1919, the court entered an order overruling plaintiff's amended motion for new trial, to which action of the court plaintiff in open court excepted and gave notice of appeal and sixty days from said date was allowed in which to prepare and file bills of exception and statement of facts (Tr. 45). On November 18, 1919, appellant filed its appeal bond with the District Clerk, when and where said bond was approved by the said clerk (Tr. 45-46-47). Thereafter the court extended the time thirty days from December 28, 1919, in which appellant might prepare and file statement of facts and bills of exception (Tr. 48). Thereafter, and in due time, statement of facts and transcript were duly filed in this court, and said cause is now regularly before this court for review.

Appellant's First Assignment of Error.

The court erred in failing to grant plaintiff's special question No. One requesting the court to instruct the jury to return a verdict in favor of plaintiff against the defendants the El Paso & Southwestern Railway Company, the El Paso & Northeastern Railway Company and the Chicago, Rock Island & Pacific Railway Company for the amount sued upon, because under the bill of lading covering the shipment of cattle involved in this suit, as well as the undisputed evidence introduced in said cause, plaintiff was entitled to a judgment against said named defendants.

144 Appellant's Proposition under Its First Assignment of Error.

The bill of lading issued by the receiving carrier to the plaintiff having provided that the carrier would deliver said cattle to the plaintiff, its order or assigns, and the undisputed evidence having shown that no such delivery was made, plaintiff as a matter of law was entitled to a judgment against the defendants.

Statement.

The material portions of the bill of lading issued by the railroads to the plaintiff provided:

"This agreement made between the El Paso & Southwestern Company, of the First Part, and the City National Bank, of the Second Part, Witnesseth: That for the considerations and mutual covenants and conditions herein contained the said First Party will transfer for the said Second Party the livestock described below and the parties in charge thereof, as hereinafter provided:

"28 cars, said to contain 147 head of cattle, from El Paso, Texas, station to Tucumcari station, consigned to First National Bank, Kansas City, Missouri, at published tariff rates * * * and in consideration of said rate it is mutually agreed between the parties hereto as follows: (S. F. 9) That said second party, at his own risk and expense, is to take care of, feed, water and attend to said stock * * * and agreed to hold said First Party harmless on account of any loss or damage to his said stock while being so in his charge and so cared for and attended to by him or his agents * * * (S. F. 10).

"That in all cases when said First Party shall furnish, for the accommodation of said Second Party, laborers to assist in loading or unloading his stock they shall be entirely subject to his orders * * * (S. F. 10).

"First Party hereby admits that it has received at the station and on the date first above written from Second Party, containing 145 livestock as hereinbefore described, to be transported as aforesaid at the rate or rates, and subject to the rules and conditions hereinbefore and hereinafter referred to, and agrees that said livestock will be delivered as aforesaid unto Second Party or order, as assigns, or connecting lines if destined beyond, subject to the conditions hereinbefore and hereinafter expressed on the payment of transportation charges as agreed." (S. F. 13.)

Said way bill was signed as follows:

"J. C. WALLWORK,
Agent for the Company.
CITY NATIONAL BANK,
By J. A. PETERS,
Shipper.

Witness:
ELI JARVIS."

J. F. WILLIAMS testified for the plaintiff, stating that he was vice-president of the City National Bank of El Paso, Texas, and con-

nected with that institution during the months of October and November, 1911. That he remembers the shipment of cattle in question and incidents concerning same, having handled the transaction himself. That he knew J. A. Peters. That in the month of October, 1911, the said Peters had no connection with the City National Bank and was not employed by the bank. In connection with the shipment in question he was assisting John T. Cameron in bringing the cattle out of (S. F. 17) Mexico, and did that part of the work, tallying the cattle, loading and getting bills of lading and attending to the shipping. Witness further stated:

"I think Mr. Peters brought me this bill of lading, and it was attached to a draft drawn on the J. P. Peters Commission Company of Kansas City, I think, that is my recollection. This is the draft. The draft and bill of lading were then forwarded by us to the First National Bank of Kansas City with the instructions to release the cattle to the J. P. Peters Commission Company upon payment of the amount of the draft. This draft was never paid. The draft and bill of lading was later returned to us, the City National Bank."

Plaintiff introduced and read in evidence said draft, which is as follows:

"Customer's Draft.

"842 cattle.
Shipped Oct. 27, 1911.

City National Bank.

United States Depository.

El Paso, Texas, Oct. 28, 1911.

"Pay to the order of the City National Bank of El Paso, Texas \$15,801.18, Fifteen Thousand Eight Hundred One 18/100 Dollars, And charge to the account of

J. A. PETERS."

To J. P. Peters Commission Co., Kansas City, Mo.

Also a letter of instructions that went with the bill of lading as follows:

"First K. C.

"The City National Bank.

El Paso, Texas, Oct. 28, 1911.

Drawn on Peters Co. Co. amount.....	\$15,801.18
	84
	<hr/>
	\$15,885.18

"Release cattle upon payment of draft; if refused when presented kindly hold and wire us.

CITY NAT'L BANK."

(S. F. 18-19.)

"A portion of the amount involved was paid to the bank. I cannot give the exact figures of the amount paid but about \$5,000.00. We are suing for \$10,001.18, and none of that amount has been paid by any one." (S. F. 19.)

The following agreement was had:

"That the defendants delivered the shipment of cattle involved in this suit to J. P. Peters Commission Company, of Kansas City, Missouri, but this admission is not to be construed as an admission by the plaintiff that the delivery was a proper delivery, or that it was a delivery to the First National Bank of Kansas City. It is further agreed that the cattle involved in this suit and delivered to J. P. Peters Commission Co. were, at the time and place of such delivery, of the value of \$25.00 per head." (S. F. 19.)

When cross-examined Mr. Williams stated that John T. Cameron might be considered the owner of the cattle in question, but that the bank had advanced the full purchase price of the cattle. That the arrangements between the bank and Mr. Cameron were that Mr. Cameron was buying cattle in Mexico at that time and was being supplied in Mexico by a bank in Chihuahua for the purchase (S. F. 19) price of the cattle, they consigned the cattle to the City National Bank of El Paso, Texas, with a draft attached for the amount, or a letter of instructions to collect a certain amount. After they came over on the American side, clear through the custom house and delivered to us, we then refunded or advanced to the Chihuahua bank the amount they had advanced on the cattle; then we took the transaction over from Mr. Cameron and advanced the money to pay them back and shipped them to Kansas City for sale. We had no arrangements for anybody to handle them for us in Kansas City. J. A. Peters is a son of J. P. Peters of the J. P. Peters Commission Company, he was working with Mr. Cameron, I think, as a cattle buyer at that time * * *. The cattle were loaded into cars under a release and then billed out under our instructions; I did not personally go down to the railroad office to ship them * * *. There had been quite a number of these shipments prior to this particular one, and Mr. Peters had looked after all or nearly all of them * * *. We presumed that he was shipping these cattle to Kansas City and that they were being handled there by the J. P. Peters Commission Company. On the other shipments the returns had been made to us prior to delivery, so far as we knew, we did not know that they had been turned over to the J. P. Peters Commission Company and then returns made to us * * *. Prior to the shipment of any of these cattle we had not looked up the financial standing of the J. P. Peters Commission

Company; we did not know about that and made no inquiries about it. (S. F. 20.)

Witness further testified:

"I want to make this statement as to whether or not as a matter of fact we knew that in all probability the cattle would have to be sold before the money was paid and sent through the bank to us. The only security we had in advancing the money on those was to ship to somebody we knew to be absolutely responsible, which was our bank in Kansas City. The bank was instructed to deliver the cattle when the draft was paid. We did not have any agreement or arrangement with the First National Bank of Kansas City, whereby the bank was to pay us this draft before the cattle were sold. I did not know that these cattle would have to be sold before the money would be turned into the bank to remit to us. We were not interested in who or how the draft was to be paid as long as they were in our possession; they were not to be delivered until the draft was paid. It was up to Mr. Peters to get the money and pay the bank, or somebody. It was our understanding that Mr. Peters was to handle these cattle after they got to Kansas City, and get the money and pay into the bank. I did not understand that Mr. Peters would have to have possession of these cattle in order that he might handle them in that way. We did not rely upon Mr. Peters getting the money for these cattle and turning the money in to the First National Bank, we relied upon somebody paying the bank the money before the cattle were delivered. Nobody had a right to sell the cattle until they were released, and nobody could release them, according to our idea, until the money was paid; that was exactly the understanding. We have no knowledge to the contrary that a single one of these, shipments prior to this particular one, in which the money was paid through the First National Bank before the cattle (S. F. 22) were sold. We assumed that all of it was; we always got our money."

Witness further testified:

149 "Our interest in these cattle was simply that they were sent here on a draft from a bank in Chihuahua, and we advanced money to the extent of the draft and the cattle were turned over to us, and we billed them to the First National Bank of Kansas City for the purpose of collecting that money if they were delivered to anybody. The cattle were in our possession here and billed out by our order to Kansas City. We were consignors * * *. I never saw prior to the time that we drew this draft and sent this bill of lading to the First National Bank of Kansas City, any (S. F. 32) other writing regarding this shipment from the railroad company * * *. A draft was drawn on the J. P. Peters Commission Company by young Peters, and that was attached to the bill of lading, and the bill of lading was to be delivered when the draft was paid; that was the instruction that went with the draft." (S. F. 24.)

The witness further testified as follows:

"I never at any time instructed J. A. Peters to execute or instruct the railway company to execute for the City National Bank was bill consigning the cattle, or any of the shipments of cattle, to the First National Bank, care of J. P. Peters Commission Company. I did not know at the time those way bills were issued or any time prior to the shipment involved was shipped, that those way bills had any shipping directions to J. P. Peters Commission Company, or that any of the bills of lading that were presented to me by J. A. Peters covering this or previous shipments, had that clause in them. I would not have accepted any with that clause in them. We shipped the cattle with bill of lading directed to the First National Bank, draft attached, because we had advanced money on these cattle, we thought we would consign them to a reliable institution representing us, and we thought they would collect the money, and we get our money back." (S. F. 40.)

J. A. PETERS, a witness for the defendants, testified that he was the son of J. P. Peters, and working for the J. P. Peters Commission Company, Kansas City, Missouri, in October, 1911, and was connected with the shipment of the cattle in question * * *.

150 That he took charge of them not only at the instance of the City National Bank but also of Mr. Cameron and the Peters Commission Company of Kansas City * * *. That he signed all the contracts and looked after that, and all the shipments; that he signed the livestock contract under which the cattle moved out of here as agent of the City National Bank. (S. F. 28.) The witness, Peters, continued:

"I do not remember that the City National Bank ever instructed me to bill these cattle in care of the Peters Commission Company. They never did that I remember of. I had no authority to sell the cattle without handling them for the City National Bank. We sold numerous shipments here. I had no authority to give bills of sale, execute any bill of sale myself for those cattle. I do not remember that the City National Bank authorized me to bill these cattle care of the Peters Commission Company instead of the First National Bank of Kansas City. I do not remember of ever talking to them about it, or telling them that I had done it. I would not want to swear either way * * *. My interest in the cattle was merely an equity and the City National Bank had title and possession and claimed the cattle until their money was repaid to them, and it was the understanding that I had no right to release these cattle from the possession and ownership of the City National Bank by anything that I did until they were first paid for." (S. F. 31.)

A. C. JOBES, a witness for plaintiff, testified that he was vice-president of the First National Bank of Kansas City, Missouri, and connected with said bank on October 27, 1911, as such official; that there was a draft drawn by the City National Bank of El Paso upon the Peters Commission Co., in connection with this shipment for \$15,-

801.18, that his books show no record of the draft for the reason that the only record kept by the bank for collection items is made upon the letter transmitting the item to the bank for collection and that the letter of instructions was at the request of the City National Bank returned to them. (S. F. 13.) That previous to the shipment inquired about there had been other shipments of cattle from the City

National Bank consigned to the First National Bank of Kansas City, but whether or not the billing showed the consignment to be in care of the J. P. Peters Commission Company, witness did not know. The witness further stated that if the railroad companies, or either of them, at any time gave notice to said bank that said cattle had arrived in Kansas City, it was not brought to the bank's attention. (S. F. 17.)

J. F. WAITE, witness for the defendants, testified:

That he lived in Kansas City in October, 1911, and was office manager for the J. P. Peters Commission Company at Kansas City, and was familiar with the handling and disposition of the cattle in question at Kansas City; that previous to the time of this shipment there has been other shipments from the City National Bank of El Paso (S. F. 24) to Kansas City; that a representative of the bank had been in their office the day these cattle arrived; he was a collector. He has been there at other previous times with reference to drafts on shipments. The draft is made out at El Paso and sent to the First National Bank of Kansas City for collection, and they send their man down to the stock yards with the draft for collection. The draft is taken up by check and the collector goes back to town. He was there the day before this shipment came in. He did not ask anything about these cattle. I told him the cattle were not in yet. He was there the next day. The cattle were then in the pens and I told him the cattle were not sold. They were in the pens of the J. P. Peters Commission Company. I did not tell him they were in the pens of the J. P. Peters Commission Company. Nothing was said by him with reference to that matter. I suppose the cattle were sold in the course of a half hour after he left. These cattle were down there when the collector of the First National Bank of Kansas City came down and asked me about them the last time, and I told him they were in the pens. He gave me no instructions about how to handle them * * *. The previous shipments were delivered to the yard man of the J. P. Peters Commission Co. The collector of the First National Bank did not know of the delivery of the previous shipments, nor did the bank. Nothing was done by the bank with reference to the previous shipments with reference (S. F. 25) to whether they were paid any sums of money arising from their sale. The commission company paid drafts at the bank

152 drawn against them on previous shipments commencing October 4th. As I said before, the bank in El Paso would send the draft to the First National — of Kansas City for collection; they would send it down to the office of the J. P. Peters Commission Company, and we would issue them a check to take up the draft.

The drafts were always drawn against the J. P. Peters Commission Company, and on the previous shipments sold the drafts had been paid to the bank. In this particular instance the draft was not paid. The way bills on all the shipments had the same consignee and person in whose care they were shipped, and delivery on all was exactly the same to J. P. Peters Commission Company. At that time, and at the present time, Kansas City is a large cattle market, and they have big stock yards there where incoming cattle are taken and sold to purchasers. There is a general custom with reference to how these cattle are handled after they reach Kansas City, as to whether they are handled on the way bill or otherwise. Business men, bankers and others dealing in cattle know of the custom and manner of handling cattle after they reach Kansas City * * *. In some cases the draft did not get there before the cattle; in those cases the draft was held until the cattle were entered and sold (S. F. 26) * * *. The City National Bank is the consignor named in all of those way bills, and the First National Bank of Kansas City is the consignee, care J. P. Peters Commission Company * * *. The shipments were handled on the stubs from the original way bills. These cattle were handled at Kansas City stock yards on the stubs of the way bills. I know how the way bills and stubs of way bills are made out. They are made out by the agent of the railroad company. I have had experience with contracts between shipper and consignee. The way bill has no contract on it at all, of the agreement between the shipper and the carrier (S. F. 27) * * *. After contracts are made out the way bill is then made out by the railroad company. (S. F. 28.)

JOHN FOX, a witness for the defendants, testified that he was the live stock agent of the Rock Island Railroad, and had the same position in Kansas City, Missouri, in 1911; that he was familiar with the Kansas City stock yards and the method and manner of handling cattle in the Kansas City market.

153 * * * That it was the custom to deliver cattle at the stock yards on the way bill or way bill stub; that the contracts were not used. None of the carriers knew anything about the contract; that the receiving agents of the carriers rarely, if ever, know anything about the contracts until surrender to them for the purpose of obtaining return transportation for the caretakers. That custom was not limited in any manner, generally known to be the custom * * *. I could not say that this custom was known to the First National Bank of Kansas City. When the railroad company delivers to the stock yards the railroad company looks to the stock yards company to reimburse them for any freight charges and any other charges that may be against the cattle. The railroad company does that without regard to who they are consigned to; they deliver them to the stock yards company (S. F. 32) and take them out without regard to whom they are consigned to. When a shipment of cattle comes to Kansas City the railroad turns them over to this stockyard company without regard to whom they may be con-

signed. It is my understanding that the stockyards company is bound to the railroad company to see to proper delivery * * *. The shipment of October 27th, was handled in delivering on original way bill, and the previous shipments were handled in the same manner; there may have been a few handled with stub bill * * *. At that time it was the generally known custom in Kansas City to handle the live stock there that way. They were handled that way because that was the only means of delivery to the stock yards * * *. The live stock contract is retained by the shipper for transportation purposes. That was the generally known custom. I could not say whether that custom was known by the First National Bank.

E. F. REESE testified that he was the local live stock agent at Kansas City stock yards for the Chicago, Rock Island & Pacific Railroad, in 1911, and knew of the shipment in question and of the previous shipments inquired about. The shipment in question was handled in delivering on original way bill, and the previous shipments were handled in the same manner * * *. The live stock contract is retained by the shipper for transportation purposes, and that custom was generally known. I cannot say whether that custom was known by the First National Bank. I do not know whether that custom was known to the City National Bank of El Paso, 154 or the First National Bank of Kansas City. I know that the City National Bank had previous shipments that were handled under that custom * * *. My only information as to what the City National Bank had done at any time was from the billing instructions. My information was gained from way bills. That was the only evidence I had of it * * *. (S. F. 34.)

ED. W. JARVIS, a witness for defendants, testified that in October, 1911, he was working for the El Paso Transfer Station, known as the Joint Warehouse, and was bill clerk then. After identifying the bills of lading in question and the 28 way bills covering the shipments of cattle from El Paso to Kansas City, Missouri, from the City National Bank, consigned to the First National Bank of Kansas City, care of J. P. Peters Commission Company, the witness stated that J. A. Peters issued the billing instructions on these cattle. His instructions were: The cattle were bil'ed from the City National Bank to the First National Bank of Kansas City, care of the J. P. Peters Commission Company (S. F. 35); these shipments were delivered on Mexican Central transfers and shipments handled through the Joint Warehouse * * *. These shipments came in here consigned to the City National Bank from Mexico (S. F. 36).

J. C. WALLWORK, a witness for the defendants, testified that he was joint agent at the Joint Warehouse in El Paso, in October, 1911; that he remembered a series of shipments by the City National Bank here to the First National Bank of Kansas City, in October, 1911 (S. F. 38); that a bill of lading preced-s the way bill. After the execution of the bill of lading then comes the way bill. Way bills are for

carrying freight, for the enlightenment of the conductor, for the conductor to know what he has on his train. In other words, we make up a train of cattle and execute the bills of lading and then we issue our way bills and deliver those to the conductor; when he gets to a terminal he passes those along until they reach their destination. That is the purpose and object of way bills. The shipper does not sign the way bills, he has nothing to do with them. They are for the use of the railroad company. Nobody has possession of the way bills except the conductor of the railroad. The shipper or agent accompanying this shipment does not have the way bills, and
 155 no duplicate is issued * * *. The caretaker has no connection with the waybills, or should not have * * *. Way bills should be made out in conformity with the bills of lading or shipping contracts, unless sometimes the contracts are made out and then they come around and ask you to add something on there and in your hurry the billing clerk is liable to forget to put it on the other; that has been known in several cases. It is an oversight of the railroad if they fail to put that on the contract * * *. (S. F. 38-39.)

Authorities.

- Section 7 of the Act of Congress of June 29, 1906, known as the Carmack Amendment to the Hepburn Act, 199, Supplement to the Federal Statutes Ann., p. 273.
 Moore on Carriers, 2nd Ed. Vol. I, p. 215-16-17-18; also p. 226, 232-3-4-5.
 Elliott on Railroads, 2nd Ed. Vol. 4, Art. 1426-7-8, 1429A, 1523.
 Hutchinson on Carriers, 2nd Ed., Arts. 130, 131.
 Daniel on Negotiable Instruments, 6th Ed., Vol. 2, Art. 1733B, 1734, 1734A, 1734B, 1734C, 1736.
 Vol. 10 Corpus Juris, Tropic Carriers, Art. 251, 369, 370, 371, 376, 377, 378.
 Vol. 4, Ruling Case Law, under Topic Bills of Lading, Art. 15, 18, 19, 24.
 Vol. 4, Ruling Case Law, under Topic Carriers, Arts. 291-2-3, 296-7.
 Nashville Ry. Co. vs. Grayson, Texas Supreme Court, 93, S. W. 431.
 McMahon vs. State Natl. Bank, 160 S. W. 403.
 H. & T. C. Ry. Co. vs. Adams, 49 Texas, 759.
 Dow vs. National Exchange Bank, U. S. Supreme Court, 23 L. Ed. p. 214.
 156 N. Pa. R. R. Co. vs. Commercial National Bank, U. S. Supreme Court, 31 L. E. 287.
 Thames vs. Seamon, U. S. Supreme Court, 20 L. E. 804.
 Southern Express Co. vs. Dickson, U. S. Supreme Court, 24 L. E. 285.
 Barnard vs. Kellog, U. S. Supreme Court, 19 L. E. p. 987.
 Walters vs. Western & A. R. Co., 66 Fed. p. 862.
 Merchants Exchange Bank vs. McGraw, 59 Fed. 972.

- Bank vs. Crocker, 114 Mass., p. 163.
 Furman vs. Union Pacific Ry. Co. (N. Y.), 13 N. E. 587.
 Atl. Coast Line R. Co. vs. Dahlberg (Ala.), 54 So. 168.
 Sturges vs. Detroit G. N. & M. Ry. Co. (Mich.), 131 N. W. 706.
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 Douglas vs. Peoples Bank (Ky.), 9 A. S. R. 276.
 Boatman vs. Western & A. R. Co. (Ga.), 7 S. E. 125.
 Pa. R. Co. vs. Stern, 12 Atl. 756.
 Nebraska Meal Mills vs. St. L. S. Ry. Co. (Ark.), 38 L. R. A. 358.
 Walters vs. Western & A. R. Co., 63 Fed. 391.
 First Natl. Bank vs. Crocker, 111 Mass. 163.
 Judson vs. Minn. & St. L. R. Co. (Minn.), 154 N. W. 506.
 Coovert vs. Spokane P. & S. Ry. Co. (Wash.), 141 Pac. 324.
 157 Neill vs. Rogers Bros. Prod. Co. (W. Va.), 23 S. E. 702.
 Sou. Ry. Co. vs. Webb (Ala.), 39 So. 262; 11 A. S. R. p. 45.
 Wolfe vs. Mo. Pac. Ry. Co. (Mo.), 11 S. W. p. 49; 10 A. S. R. 331.
 Marshall vs. K. C. R. R. Co. (Mo.), 75 S. W. 638; A. S. R. 508.
 Merchants Co. vs. Merriam (Ind.), 11 N. E. 954.
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 Ark. Sou. Ry. Co. vs. German National Bank (Ark.), 92 S. W. 522.
 Second National Bank vs. Cummings (Tenn.), 18 S. W. 115.
 Kentucky Rfg. Co. vs. Globe Rfg. Co. (Ky.), 47 S. W. 602.
 Burgess vs. St. L. & S. F. R. R. (Mo.), 161 S. W. 858.
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 Bank vs. Jones (N. Y.), 55 A. D. 201.

Authorities (on the Question of Custom).

- Vol. 4, Ruling Case Law, subject Bill of Lading, Art. 27.
 Vol. 10 Corpus Juris, Art. 364.
 Bernard vs. Dunham, 19 L. E. p. 990.
 Alexander vs. Heidheimer, 221 S. W. 943.
 N. Pa. R. R. Co. vs. Commercial National Bank, 31 L. E. 291.
 Bank of Commerce vs. Bissell, 72 N. Y. 615.
 Pa. R. R. Co. vs. Stern (Pa.), 4 A. S. R. 627.
 Weyland vs. A. T. & S. F. Ry. Co. (Iowa), 9 A. S. R. 504.
 Midland Nat. Bank vs. Mo. Pac. Ry. Co. (Mo.), 33 S. W. 521.
 Charles vs. Carter (Tenn.), 36 S. W. 396.
 Union Stock Yards Co. vs. Westcott (Neb.), 66 N. W. 419.

Authorities (on Question of Agency).

31 Cyc., p. 1341.

Dows vs. National Exchange Bank of Milwaukee, 23 L. E. p. 218.

Stollenwerck vs. Thatcher, 115 Mass., 224.

Second National Bank vs. Cummings, Tenn., 18 S. W. 115.

Argument under the Foregoing Assignment.

This assignment of error calls into question mainly the construction of the bill of lading issued by the railroad company to the plaintiff. If, according to the terms and conditions of the bill of lading, and the surrounding facts leading to its issuance, the delivering carrier failed to deliver the cattle to the true owner, or if it did not deliver according to the terms of its contract, the defendants are as a matter of law liable for conversion, unless the mis-delivery was due to the fault of the shipper. That this assignment may be considered without the necessity of reiterating fully the testimony or setting forth again the terms of the bill of lading, it might be useful to summarize the evidence.

John T. Cameron, a cattle dealer, was a customer of the plaintiff bank, and had purchased in Mexico these cattle and in payment therefor drew on the bank for the purchase price. The bank honored said draft and as security for the amount advanced to Cameron received and took charge of the cattle. J. P. Peters Commission Company were cattle commission merchants in Kansas City, Missouri, and through J. A. Peters, a son of J. P. Peters, the proprietor of the Commission Company, arranged for the purchase of the cattle. The bank, as regards the railroad and its liability in this case, was the owner of the cattle, and through J. A. Peters said cattle were delivered to the defendant railroad, at El Paso, on October 27, 1911, at which time the receiving carrier delivered to Peters, for the bank, the bill of lading in question. The bill of lading was executed in duplicate by the receiving carrier, through its agent, and the bank, through J. A. Peters, and a duplicate was delivered by the Said Peters to the bank and the carrier retained the other copy. A sight draft was drawn for the purchase price by J. A. Peters, drawer, on

J. P. Peters Commission Company, drawee, payable to the City National Bank of El Paso. The draft and the bill of lading received by the bank were forwarded to the First National Bank of Kansas City for collection and delivery, that is, on payment of the draft, the bill of lading was to be delivered to drawee, the J. P. Peters Commission Company; and the First National Bank was so instructed by plaintiff in its correspondence relative thereto. In due course of time the cattle arrived in Kansas City and were delivered by the delivering carrier to J. P. Peters Commission Company without presentation of the bill of lading or the payment of the draft. There were several previous shipments from and to the same parties. In all shipments the bills of lading were the same, as in this case, and the way bills, including the present shipment, provided that the

consignee was the First National Bank, care of the J. P. Peters Commission Company. It was alleged, and proof was introduced showing, that it was the custom in Kansas City to deliver on the way bills and that the bill of lading was never used or considered by the railroads in making its deliveries. No evidence, however, was introduced showing that the First National Bank or the City National Bank knew, or had knowledge, of said custom. There was also evidence showing that previous shipments from and to the same parties had been delivered to the Peters Commission Company without a surrender of the bill of lading and before the draft drawn by the City National Bank on the Peters Commission Company had been paid, but there was no evidence showing that the City National Bank knew or had any knowledge of said facts. Suit has been instituted by the plaintiff bank as shipper of said cattle, and holder of the bill
 161 of lading, against the defendants below, who are the carriers involved in the transportation of the cattle.

The bill of lading as far as applicable to the issue involved in this assignment, provided:

"Contract.

"Executed in Duplicate at El Paso, Texas, Station, Oct. 27, 1911.

"This agreement made between the El Paso & Southwestern Company of the first part, and City National Bank of the second part.

"Witneseth: That for the consideration and mutual covenants, and in considerations herein contained, the said first party will transport for the said second party the livestock described below, and the parties in charge thereof, as hereinafter provided: 28 cars, said to contain 147 head of cattle, from El Paso, Texas, station to Tucumcari station consigned to the First National Bank, Kansas City, Mo., at published tariff rate; said rate being less by virtue of the execution of this contract than rate for shipment transported without limitation of carrier's liability except at common law, and in consideration of said rate, and other considerations, it is mutually agreed between the parties hereto as follows:" (S. F. p. 10.)

In paragraph three of the bill of lading it was provided that the second party (being the bank) at his own risk and expense is to take care of, feed, water and attend to, said stock, etc., and hold first party (the railroad) harmless on account of any loss or damage to his (the bank's) said stock while being in his charge and attended by him or his agents or employees (the bank).

In paragraph five it was provided:

"That when first party shall furnish for the accom-odation of second party laborers to assist in loading or unloading his (bank's) stock, they shall be entirely subject to his (the bank's) orders." In paragraph six it was also recited: "That second party (the bank) expressly agreed that as a condition precedent to his (the bank's) right to any damage to his (the bank's)

said stock, second party will give notice in writng of its claim therefor, etc."

We have quoted these provisions of the bill of lading as showing the bank to be the owner of the cattle and recognized as such owner throughout the shipment and transportation: It is our contention that the bill of lading in question is what is known as an "Order Bill of Lading" as distinguished from a "Straight Bill of Lading." That is an Order Bill of Lading is clearly shown by paragraph thirteen of the contract which provided:

"Thirteenth. First party hereby admits that it has received at the station and on the date first above written, from second party, certain livestock as hereinbefore described, to be transported as aforesaid at the rate or rates, and subject to the rules and conditions hereinbefore and hereinafter referred to, and agrees that said livestock will be delivered as aforesaid unto second party or order, or assign, or connecting lines if destined beyond, subject to the conditions hereinbefore and hereafter expressed on the payment of transportation charges as agreed." (S. F. 13.)

Bearing in mind that plaintiff bank was the owner of the cattle and the shipper and the second party in a bill of lading prepared, executed and delivered by the carrier, the carrier is charged with notice of such ownership and control over the cattle as the evidence leading up to the delivery to the carrier would indicate and the contract discloses. If the facts and circumstances surrounding the transportation of the cattle the purpose of the consignor in shipping them, and the method of collecting the sale price, and the terms of the bill of lading, should indicate that the bank intended to retain control over the cattle, the carrier would be liable for a delivery contrary thereto. Also, the bank as shipper and owner of the cattle, and consignor in the bill of lading, was the proper person to whom delivery should be made, and if delivery is made by the carrier to any other person than such owner, the delivery is at the peril of the carrier.

It is not a question of negligence on the part of the carrier, it is a violation of the right of the owner of the cattle and the holder of the bill of lading, that a carrier should deliver to the proper person; therefore, no issue of negligence is involved. The carrier's liability is positive and absolute, and to relieve it from responsibility in this case it must show that it delivered the cattle according to the contract, or was lead or induced by the consignor and holder of said bill to deliver the cattle at variance with the contract. We do not believe it will be seriously contended that the acts and conduct of the plaintiff bank in any respect controlled or influenced the delivery of the cattle to the J. P. Peters Commission Company. The City National Bank in all prior shipments, as well as the one in question, received from the carrier the same kind of contract and in each case is forwarded its contract or bill of lading and draft to the First National Bank of Kansas City, for the purpose of collecting the amount

of draft and delivering the Bill of Lading to the Peters Commission Company upon payment. On payment of said drafts from previous shipments, the First National Bank in turn immediately remitted to the plaintiff bank. While it is true there was some evidence showing that deliveries of previous shipments had been made by the carrier to the Peters Commission Company prior to the payment of the drafts by the plaintiff bank, there was no evidence showing, or tending to show, that the City National Bank had knowledge of said facts. There was likewise no testimony from any source indicating that the plaintiff bank knew of any custom relative to delivering of cattle at the Kansas City Stock Yards on the way bills, or had any knowledge of any custom as regards deliveries of cattle at variance with or contrary to the terms of the bills of lading received from the railroad.

The bill of lading having been prepared and filled out by the carrier and its agents and delivered by it, a construction, if its meaning is doubtful, will be placed thereon unfavorable to the carrier. The bill of lading begins with the provision that it is a contract executed in duplicate, and an agreement made between the El Paso & Southwestern Company as the First Party and the City National Bank as the Second Party. It then provides that said First Party will transport for the Second Party the livestock from El Paso, Texas, consigned to the First National Bank of Kansas City, Missouri, and for the consideration mentioned it was mutually agreed:

"First Party hereby admits that it has received * * * from Second Party certain livestock * * * to be transported as aforesaid * * * and agrees that said livestock will be delivered as aforesaid unto second party — order or assign * * *."

When the carrier prepared and put into circulation a bill of lading which provided in the last part of its contract an admission that it had received livestock from the second party and agreed to deliver said livestock unto second party or order or assigns, no other construction can be placed on said contract, than that the bill of lading in question is an Order Bill of Lading, clearly indicating the intention of the shipper to retain control over the cattle throughout the shipment, and clearly meaning and providing that the delivery of said cattle will be made only to second party or order or assigns. So, considering this contract, when the carrier delivered the cattle to any other person than the shipper, his order or assigns, it breached its contract and is liable for the misdelivery.

The defendants, through their pleadings and evidence, raised an issue to the effect that it was intended for the bill of lading to so read as to consign the cattle to the First National Bank care of J. P. Peters Commission Company, and that J. A. Peters as agent for the plaintiff had instructed the agent of the carrier to prepare the bill of lading accordingly; but through mutual mistake of said carrier and said J. A. Peters the bill of lading omitted "care of J. P. Peters Commission Company." The defendants likewise put in issue that it is the custom for the railroads in Kansas City to deliver on way bills and not upon the bill of lading. Also, that in some of the previous ship-

ments from and to the parties involved in this suit, deliveries had been made to the Peters Commission Company before the drafts drawn by the plaintiff bank on the Peters Commission Company had been paid. For the purpose of this assignment appellant admits that

it was the mutual mistake of said agent of the carrier and the
166 said J. A. Peters that the bill of lading did not consign the cattle to the First National Bank, care of J. P. Peters Com-

mission Company. We take the position that the bill of lading in question having clearly indicated that the shipper retained control over and the right of disposition of the cattle, even though the bill of lading had provided for the consignee to be the First National Bank, care of J. P. Peters Commission Company, the carrier was not authorized to make a delivery either to the First National Bank or the J. P. Peters Commission Company without an order from the shipper, the City National Bank, or without presentation of the shipping contract duly endorsed. The law is well settled that where a contract of affreightment reserves the *jus disponendi* (right to disposition) to the shipper, the carrier cannot deliver the shipment even to the consignee without the authorization of the shipper. That the right of disposition in the present bill of lading was reserved to the City National Bank is plainly indicated in paragraph 13 of the bill of lading, wherein the railroad admitted the receipt from the bank of the live stock and agreed that it would deliver said livestock unto the said bank or order, or assigns. In the previous portion of the bill of lading it was several times recited that the cattle in question belonged to the City National Bank. Such recitations were notice to the railroad that the City National Bank was the owner of the cattle and entitled to the possession of the same throughout the transportation, including delivery, and that the railroad could not deliver except
"unto second party, or order or assigns." It was admitted
167 in the trial of the case that a delivery was made to the Peters Commission Company without an order from the City National Bank and without the presentation of the bill of lading covering the shipment.

Under the head of "Termination of Liability" the question of proper delivery is fully considered in Moore on Carriers, Vol. 1, Second Edition, Art. 9, which provides:

"A bill of lading is a representative or symbol of the property mentioned therein and its transfer and delivery without endorsement or when properly endorsed and delivered when endorsement is necessary, operates as constructive transfer and delivery of the property itself and the consignor loses control of the goods by such transfer. Therefore when the bill of lading has been issued, it being the duty of the carrier to deliver to the owner of the goods or the person entitled to receive them, delivery must be made to the holder of the bill of lading and the carrier is liable for a delivery otherwise than in accordance with the bill of lading, or to a person who is authorized to receive the goods, although he may be the consignee. A common carrier delivers at its peril goods to the consignee without the bill of lading either made or endorsed to him. It is the duty of the carrier

to ascertain whether bill of lading has been issued and if it has, to deliver only to the party producing such bill properly endorsed, where endorsement is necessary. A delivery of goods to a carrier will not be held to be a delivery to the consignee where, by taking a bill of lading to his own order, the shipper reserves to himself the power of disposition of the property."

It is said in Article 10:

"The consignee is presum-tively the owner of the goods and delivery to him without notice to the contrary will discharge the carrier. If the party who claims the goods is not the consignee, and even where he is the consignee, the carrier is entitled to demand the production of the bill of lading in order to obtain possession of the goods and for
168 its own security of the assignability of the bill of lading where by all rights in goods may be transferred to a stranger, should require it to be presented before making delivery either to the consignee or the holder of the bill."

Article 17, under the head of "Bill of Lading attached to Draft" reads:

"Where the holder or owner of property consigns the property shipped to purchaser, upon payment of draft attached to the bill of lading for the purchase price of the goods, the title to the property does not pass to the purchaser and the purchaser then named as consignee is not entitled to the delivery of the property until he has accepted and paid the draft accompanying the bill of lading, and received the bill of lading; and a delivery to him before the draft is paid and the bill of lading delivered to him, or without requiring production of the bill of lading properly endorsed will render the carrier liable to the shipper or owner of the property for the draft if the purchaser fails to pay for the property."

Article 21, title "Carrier's Liability for Mis-delivery" states:

"Common carriers deliver property at their peril and must take care that it is delivered to the right party. The obligation to deliver to the proper person is absolute and *in* rigorously enforced by the courts, and the law allows no excuse for a wrong delivery except the fault of the shipper himself. When there is any doubt as to who is the proper person to make delivery to and it can be determined by the bill of lading or other documentary evidence, its production should be required by the carrier and the property detained until demanded by one claiming under such title. If delivery be made to the wrong person by an innocent mistake or through fraud imposition, or deceit of a third person, as upon a forged order, the carrier will be responsible, and wrongful delivery will be treated as a conversion * * *. No amount of care or caution will relieve the carrier since it is not a question of want of care or negligence; the carrier's undertaking as *in* insurer is to deliver safely as well as to

169 carry safely; its liability as an insurer extends to a delivery to the proper party and its warranty as an insurer is broken by a misdelivery. It is the duty of the carrier in all cases to be diligent to the person entitled, and where delivery is made to the consignee or any other particularly specified person the carrier is bound to require evidence of the identity of the party claiming delivery as the real party entitled, and it cannot properly, or without incurring liability to the true owner, deliver the goods to any person who calls for them other than the rightful owner, and cannot plead imposition practiced by others as a defense to an action for misdelivery."

The principles nunciated by the author of "Moore on Carriers" are also laid down in "Elliott on Railroads," Second Edition, Vol. 4. Quoting from Art. 1426, under the heading "Delivery by Carrier" it is stated:

"A bill of lading is regarded as a symbol of the property therein described and stands in the place of the goods it represents. If it is issued to the true owner of goods it secures his title thereto during the period of transportation while the ownership and possession are served. The carrier must bear the risk of delivering the goods to the person entitled to them, under the bill and its endorsements. If there be no reservation by the shipper the title presumptively rests in the consignee, but, under some circumstances, only after his receipt of the bill of lading. A delivery to him, upon presentation of the bill will discharge the carrier, he having had no notice of the failure of the presumption. A bill directing delivery to the vendor's order is prima facie evidence that he does not intend that title shall pass to the vendee, and notice to the carrier that he must not deliver to the consignee without the bill properly indorsed by the consignor."

Article 1428 under the heading "Bills of lading assignable, but not negotiable" provides:

"As already stated, bills of lading are not negotiable as commercial paper, and any defense available against an action by the shipper is generally available against one by an innocent holder for value."

170 Article 1429A entitled "Bills with draft attached" says:

"Bills of lading often have drafts or bills of exchange attached to them by the shipper, especially where the shipper has procured the bill of lading to be made out so as to provide for delivery to his order, and there may be a direction in the bill of lading to notify the purchaser or other person on whom the draft is drawn. Such person, though named as consignee, is not ordinarily entitled to delivery of the property until the draft is paid and the bill of lading properly produced, and the carrier will usually be liable if loss is caused by delivery without the production of the bill of lading and a proper showing in this regard."

Article 1523 entitled "Delivery must be to right person" provides:

"The rule in regard to the person to whom delivery must be made is very strict. It must be made to the right persons, and it seems that neither the fraud or imposition of anyone else nor mistake on the part of the carrier will excuse it from liability if it delivers the goods to the wrong person. The right person is, ordinarily, the consignee or his authorized agent. But if the carrier delivers to anyone, even to the consignee, without the production of the bill of lading, it runs the risk of having to show a delivery in accordance with the terms thereof, and where a vendor ships goods and takes a bill of lading in his own name or to his own order, the carrier cannot safely deliver the goods to anyone else unless the bill is endorsed or transferred by him and produced by the person to whom they are delivered. Indeed, it has been held that where the bill of lading requires the goods to be delivered to the consignor, the mere production of the bill by another, unindorsed by the consignor, will not justify the carrier in delivering them to such other person, unless the consignor intended to pass the title to the goods by the transfer of the bill of lading without the endorsement, and that a mere local custom to deliver goods to any person who produces the bill of lading unindorsed does not bind the shipper, at least where he has no knowledge of such custom."

171 Article 1526 entitled "Misdelivery—Carrier Liable" says:

"The effect of a misdelivery of goods is in general the same as a total failure to deliver them at all and is deemed a conversion of the property by the carrier. No demand is necessary in such a case * * *"

This subject is treated by Hutchinson on Carriers, Second Edition, beginning with Article 129, as follows:

"In commercial transactions bills of lading are regarded as the representatives of the goods, and when properly indorsed and delivered, with the intention of passing the title to them, it is a symbolic or constructive delivery of the goods themselves. They are not, however, negotiable in a strictly mercantile sense like bills of exchange, but are said to be quasi negotiable. They are assignable, and possess one additional quality which is not possessed by contracts generally which are merely assignable. They stand as a substitute for the goods they represent, and their transfer when so intended is equivalent to an actual delivery of the goods themselves, though the assignee gets no greater or other rights than the assignor had."

At Article 130 entitled "Goods must be delivered only in accordance with bill of lading" the author states:

"The carrier takes the risk of a delivery to the person entitled to the goods by the bill of lading and its indorsements. The consignee named in the bill of lading is presumptively the owner of the goods, and — be treated by the carrier as the absolute owner until he has had

notice to the contrary; and a delivery to him without such notice will discharge the carrier * * *. And where goods are shipped deliverable to the order of consignor for and on account of the consignee, the carrier cannot deliver them to such consignee except upon the productions of the bill of lading properly indorsed by the consignor; for this is notice to the carrier that the shipper intends to retain in his power the ultimate disposition of the goods. Too great caution cannot therefore be exercised in respect to the right of the person to whom the delivery is made. No obligation of the carrier is more rigorously enforced than that which requires delivery to the proper person, and the law will allow in fact of no excuse for a wrong delivery except the fault of the shipper himself; and where there is any doubt and it can be determined by documentary evidence, its production should be required. Instances of great hardship to the carrier frequently occur from neglecting these precautions."

Article 130*b* provides:

"The carrier, being thus bound to deliver the goods in accordance with the bill of lading is, it is said, under obligation to ascertain whether or not a bill of lading was delivered to the shipper, and, if delivered, he must retain the property until it is demanded by one claiming under that title."

Article 131 entitled "Bill of lading to shipper's order—Draft attached" provides:

"The practice of taking bills of lading providing for delivery to the shipper's own order has become very common in order to use the bill of lading either as collateral security or to obtain payment for the goods before delivery. Where the bill of lading is so conditioned the carrier will be liable for a delivery otherwise."

A similar conclusion is reached in "Daniel on Negotiable Instruments, 6th Edition, Vol. 2. Referring to Article 1733*b* entitled "Liability of the carrier for delivery of the goods without production of the bill of lading," which provides:

"The carrier should not deliver the goods either to the consignee or to any other person without the production of the bill of lading. This rule is necessary, both for the protection of the consignee and that of bona fide transferees of the bill of lading; and if the carrier violate it by delivery of the goods without production of the bill to any person not authorized by possession of the bill to receive them, it will be liable for their value to the consignee or transferee of the bill, as the case may be."

Article 1734 provides:

173 "Sometimes a bill of lading for the goods shipped in pursuance of orders of the consignee, with a bill of exchange drawn by the shipper upon the consignee for the purchase money, are sent in one enclosure to the consignee. In such cases

the bill of exchange must be honored by the consignee, otherwise the bill of lading cannot be retained; and if it is retained the consignee has no right to the goods."

Article 1734a says:

"Frequently the consignor of the goods takes a bill of lading from the carrier, draws a bill payable on demand upon the vendee for the price, and delivers the bill of exchange with the bill of lading attached to an indorser for value of the bill of lading. In such cases the consignee upon the receipt of the goods takes them subject to the right of the holder of the bill of lading to demand payment of the bill of exchange and the consignee cannot retain the price of the goods on account of a debt due to him from the consignor * * *."

The subject is discussed by the author of *Corpus Juris*, Vol. 10, subject "Carriers," under heading "Bills of Lading:"

"An instrument issued by the carrier to the consignor, consisting of a receipt for the goods and an agreement to carry them from the place of shipment to the place of destination, is a bill of lading. The instrument is twofold in its character; it is a receipt as to the quantity and description of the goods shipped, and a contract to transport and deliver the goods to the consignee or other person therein designated or the terms specified in such instrument. By mercantile law and usage a bill of lading stands as a substitute and symbolic representative of the goods therein described, and possession symbolized by a bill of lading is the same as actual possession."

Article 252 under the heading "Validity and effect; Construction," provides:

Ordinarily the terms and obligations of the contract between the shipper and common carrier of goods are to be found in and determined by the bill of lading, that is to say, each is governed by its terms and their respective rights and liabilities are regulated thereby * * *."

Article 368 entitled "To whom delivery made," provides:

"Where the carrier receives goods under a contract, either express or implied, from the marks on the goods to deliver them to a person named, without any reservation of power of disposition by the consignor, then the delivery to such person or to his authorized agent, completes the contract and relieves the carrier from any further liability. This rests on the assumption which the carrier is authorized to entertain that the title to the goods passes to the consignee on delivery to the carrier, an assumption which is strengthened by a recital in the bill of lading that ownership of the goods is in the consignee * * *."

Article 369 says:

"The presumption that the consignee is the owner is not absolute, but may be rebutted. If the carrier has notice that the consignee is not the owner or intended to receive the goods delivery to him will constitute conversion. No particular form of notice is necessary. If the carrier has notice either by issuance of a bill of lading negotiable in form, or otherwise, that power of disposal is reserved, the carrier is not justified in making delivery except on production and surrender of the bill of lading properly indorsed. The carrier is bound to observe the directions of the bill of lading which is not controlled by the marks on the goods designating the person to whom they are sent."

Article 370 entitled "Holder of Bill of Lading," provides:

"However, if the bill of lading is made to stand for the goods, the person claiming the goods should produce and surrender the bill of lading. Otherwise the carrier will make delivery to claimant of the goods at its peril, and will render itself liable as for a conversion by delivery of the goods to one not entitled thereto without surrender of the bill of lading * * *."

175 Article 371 entitled "Effect of 'Shipper's Order' Clause in Bill of Lading" is peculiarly applicable, to the case at bar, and provides:

"The term 'shipper's order' as used in the bill of lading is well understood and means that the title remains in the shipper until he orders a delivery of the goods, and that the carrier must not deliver except on production of the bill of lading properly indorsed by the shipper. And, where the bill of lading provides for delivery to the shipper's order or to his assigns, it is liable for the value of the property to the person entitled to receive the goods if it delivers the goods to the consignee or anyone else without the bill of lading properly indorsed. Especially are the foregoing rules applicable where the 'shipper's order' bill of lading has attached to it a draft on the buyer, or where the bill of lading expressly provides that the goods shall not be delivered without its surrender properly indorsed * * *."

Article 376 entitled "Real Owner" states:

"The carrier is bound to respond to the demand of the real owner for possession of his goods, regardless of whether he is consignor, consignee, or holder of the bill of lading, and in doing so he does not render himself liable to one who, having fraudulently or otherwise unlawfully obtained possession of them, has delivered them to the carrier for transportation. This is in accordance with the general principle of the law of bailments by which the bailee is not answerable to the bailor where the bailee had performed his legal duty by delivering the goods to the true owner * * * a principle, it is said, which is especially applicable to common carriers who must carry for all who offer * * *."

Article 377 entitled "Delivery to Wrong Person" provides:

"The duty of the carrier is not merely to convey safely the goods entrusted to it, but also to deliver them to the party designated by the terms of the shipment, or to his order, at the place of destination. This duty to deliver to the proper person is absolute. If the carrier delivers goods to a person who is not entitled to receive them it is liable to the person who is entitled to them for conversion, rendering it immediately liable, regardless of a subsequent destruction of the goods by the act of God, and irrespective of its good faith in making the delivery. No question of care arises, for in such case the carrier acts at its peril and is liable regardless of negligence * * *."

Treating the subject of bills of lading the author of "Ruling Case Law," Vol 4, Art. 18, states:

"As has been well said by the Federal Supreme Court 'in the hand of the holder, it (a bill of lading) is evidence of ownership, special or general, of the property mentioned in it and of the right to receive said property at the place of delivery,' if a bill of lading shows that the consignment was made for the benefit of the consignor or his order, it is very strong proof of his intention to reserve the jus disponendi. If, on the other hand, a bill of lading shows that the shipment is made for the benefit of the consignee, it is almost decisive of the consignor's intention to part with the ownership of the property; but where it does not disclose the person for whose benefit the consignment is made, it is of less weight on the question of the shipper's intention. Therefore an ordinary bill of lading is evidence that the ownership of the property mentioned therein is in the consignee named in the bill, but it is only prima facie evidence of the same. Where a bill of lading is not delivered to the consignee it is not evidence of ownership in him. Nor is its delivery evidence of ownership when it is given merely as security for the payment of a draft attached; nor is it evidence of ownership in the transferee if it contains any conditions inconsistent with the passing of absolute title * * *."

In dealing with the question of to whom delivery must be made the author in Ruling Case Law, subject Carriers, Article 291, provides:

177 "The duty of a common carrier is not merely to carry the goods intrusted to him, but he is also required to deliver them to the party designated by the terms of the shipment, or to his order, at the place of destination. In fact no obligation of carrier is more rigidly enforced than that requiring delivery to the proper person; delivering them to one not entitled to receive them is a breach of duty, for which the carrier is accountable, and the law will allow no excuse for a wrong delivery except the fault of the shipper. Furthermore where there is a delivery to the wrong person it may, by the common law, be treated as a conversion of the

property without regard to the question of the carrier's due care or negligence * * *."

Article 293 entitled Delivery under Bill of Lading, states:

"The terms of most contracts for the carriage of goods are, of course, expressed in the bill of lading, and if a carrier delivers goods in strict accordance therewith, he thereby absolves himself from all further responsibility. Thus if a bill of lading makes goods deliverable to the consignee absolutely without any mention of order or assigns, the carrier cannot be held answerable to the consignor if he makes a delivery to the consignee without requiring the presentation or surrender of the bill, although it subsequently appears that the consignor had forwarded the bill with draft attached thereto, to a bank for collection, thus showing an intention that the consignee should not have the goods without first paying therefor, provided only that the carrier has no knowledge of such intention. In most bills of lading, however, there is some qualification of the absolute right of the consignee to receive the goods, the great majority of them making the property deliverable to order, in which event the cases practically agree that the carrier cannot safely deliver without such order or knowledge that it has not been given. This is because, by issuing bills of lading stipulating for a delivery to order, the carrier has bound himself not to deliver to anyone who has not such order from the shipper, but it is no excuse for a delivery to the wrong person that the indorsee of the bill of lading was unknown. The almost universal rule, therefore, is to require the production of the bill of lading before making a delivery, and not only is this requirement upheld as a reasonable and necessary means of protection to the carrier but a carrier who delivers goods intrusted to him for carriage even to the consignee without such production does so at his peril, and in the event that there has been a previous transfer for value to an innocent indorsee, the risk is his * * *."

We have quoted at length from the leading authorities on bailments and carriers in order to demonstrate how unanimous such authorities are on the general principles that should govern in the decision of this case. There seems to be no difference of opinion either among the text writers or the various courts where the questions have been presented in solving the problems that must be decided in the case at bar. All courts and writers agree that the carrier is held to the strictest accountability in delivering freight to it for transportation. In all events it must deliver to the proper person. No excuse for failure to deliver to the proper person is allowable except where a misdelivery is caused by the shipper or the owner. No issue of negligence is involved. The carrier is an insurer—he guarantees a delivery to the proper person. It would also seem that the carrier can deliver only to the owner, otherwise, it makes a delivery at its peril. Should it deliver to another than who is the true owner of the goods, it is incumbent on the carrier to show that such delivery was proper and according to the bill of lading, or justified by the acts

of the owner. This is true even though the carrier makes a delivery to the consignee. Where a bill of lading on its face plainly and clearly shows that the City National Bank was the owner of the cattle and with equal clearness leaves to the shipper the right
179 of disposal of the cattle, and expressly provided in the concluding portion of the bill that the carrier should deliver to the consignor, its order or assigns, it is inconceivable that the carrier can contend that it was without notice of the rights and interest of the consignor. Being bound by the terms of its bill of lading, the terms of which clearly indicate that the shipper reserved to itself the ultimate and final control and disposal of the cattle, no justification can be set forth by the railroads for delivering the cattle to the vendee of the executory contract of purchase, who had never paid the draft constituting the purchase price of the cattle, nor who had ever received or presented the bill of lading. Had the carrier taken that precaution justified by sound business principles, or been guided by the plain and important terms of its bill of lading, it would have required the production and presentation of the bill of lading duly indorsed by the second party thereto, to-wit: the City National Bank. Having delivered the shipment to the Peters Commission Company without the bill of lading, it was incumbent upon the carrier to show either that the Peters Commission Company was the owner of the cattle or, under the contract of the affreightment, was entitled to their possession. Can it be contended for a moment that the Peters Commission Company was the owner of the cattle? The undisputed facts show that they had an executory contract to purchase the cattle for the face amount of the draft that was drawn by the son of J. P. Peters upon the Peters Commission Company. No title to the cattle passed, or would pass, from the plaintiff bank to Peters Commission Company until the payment of said draft. Until said payment, the City
180 National Bank retained the title and ownership of the cattle.

It is clear, therefore, that the carrier cannot justify the delivery to the Peters Commission Company on the ground that said company was the true owner, or entitled to their possession. If said company was not the true owner of the cattle, or entitled to their possession, in the absence of their authority from the consignor, the carrier could only deliver to the Peters Commission Company provided the terms and conditions of the bill of lading so authorized a delivery to the Commission Company. A careful reading of the bill of lading will disclose no authority at any place within its four corners for a delivery even to the First National Bank of Kansas City, Missouri. On the contrary, it is especially provided in the bill that the delivery will be made to the City National Bank of El Paso, Texas, its order, or assigns. In the absence of such order, a delivery could be made to no other than the City National Bank. To construe the bill of lading would nullify and render meaningless the agreement to "deliver unto second party, or order or assigns." The best evidence of an order emanating from the holder of a quasi negotiable instrument, as a bill of lading, is the production and *presecution* of the bill duly and properly indorsed. Ordinarily precaution would likewise require that where the possession of the owner, of his personal property is served

by transportation to a distant point, so that his possession is symbolic and constructive and represented by a bill of lading in which it is provided that a delivery will be made to the shipper, or order, the shipper should not be deprived of ownership or possession or
 181 control over the shipment except through his order. To hold otherwise would prevent and endanger the many and daily transactions of worldly commerce that is being conducted through medium of bills of lading and demand drafts. No vendor who is selling property to a vendee living at a distant point could safely deliver to the carrier the subject of an executory sale should it be held that the consignee and executory vendee becomes entitled to the possession of the goods on delivery to the carrier without reference to the payment of the purchase price or the transmission of the title or right of possession of the goods from the vendee. Considering, then, the facts and circumstances in this case, and under the terms of the bill of lading, upon what theory can a delivery to the Peters Commission Company of these cattle be justified?

In the case of the *Thames vs. Seaman*, U. S. Supreme Court, 20 L. E. 804, the purchaser of cotton at Savannah delivered same to a vessel to be carried to New York, taking bills of lading in which it was stated that the cotton was shipped by one Gilbert Van Pelt and was to be delivered unto order, or to his, or their, assigns. Against the shipment he draw a draft on his firm and delivered it with bills of lading to parties who obtained a discount of the draft from a bank in Atlanta. Before the draft became due the vessel arrived at New York and it gave notice to the firm of the arrival of the cotton. That vessel had previously brought and delivered cotton in the same way for the firm, having no information from the bank's agent or from
 182 any other source of any other consignee or claimant, delivered to the firm the cotton, taking its receipt. When the draft became due, it was not paid. In the suit which followed, it was contended by the owner of the vessel that the delivery was justified but the court held that though delivery had been made in ignorance of any outstanding claim to the cotton, it was, nevertheless, a breach of the contract and that the agent of the bank could libel the vessel, which was bound for the proper delivery of the property, the court saying:

"By issuing bills of lading for the cotton, stipulating for a delivery to order, the ship became bound to no one who had not the order of the shipper, and this obligation was discharged instantly on the arrival of the ship * * *."

The case at bar is far stronger than the one from which we have just quoted. In the latter case delivery was made to the shipper—to whose order the bill ran. The bill of lading is only quasi negotiable, cutting off no defense against the transferee that the carrier might have against the original holder of the bill. If, then, the carrier is guilty of delivering to the shipper, who had previously transferred an Order Bill of Lading, without requiring its production, it surely should follow that a carrier is liable to a shipper and holder of an

Order Bill of Lading when it delivers to the consignee or anyone else who has not such bill of lading duly indorsed to him.

A similar conclusion was reached by the United States Supreme Court in the case of North Pa. R. R. vs. Commercial Bank, 31 L. E. 727. Here an action was brought by the bank against the railroad to recover the value of certain cattle received by the railroad but not delivered to the plaintiff, the assignee of the shipper, or to its order. The cattle were purchased by one Myrick, who had a receipt from the railroad company acknowledging the cattle and consigning them to the order of Myrick and notify J. and W. Blaker, Philadelphia, Pennsylvania. On the same day Myrick drew and delivered to the bank a draft for the purchase price, and as security for the payment of the draft Myrick indorsed the receipt from the railroad and delivered it with the draft to the bank, which thereupon gave him the money. The cattle were delivered to the Blakers without the production of the bill of lading and without the payment of the draft. It further appeared that Myrick had previously made numerous shipments of cattle from Chicago to Philadelphia, taking similar receipts, which cattle had been received by the same railroad in Philadelphia and delivered by it there to the Drove Yard Company, which last mentioned company had been accustomed to deliver them to the Blakers without the production of the carriage receipt or any bill of lading, or any order of the shipper for their delivery. It also appeared that there was no knowledge on part of the bank of any such practice. In deciding the case the court held:

"Upon the evidence presented, and there was no conflict in it, the law was with the plaintiff. The duty of a common carrier is not merely to carry safely the goods intrusted to him, but also to deliver them to the party designated by the term of the shipment, or to his order, at the place of destination. There are no conditions which would release him from this duty, except such as would also release him from the safe carriage of the goods * * *. They are to be delivered at the place of destination to the party designated to receive them if he presents himself, or can with reasonable efforts be found, or to his order. No obligation of

184 the carrier whether the freight consists of goods or livestock, is more strictly enforced."

In the case of Dows vs. National Exchange Bank, United States Supreme Court, 23 L. E. 214, suit was instituted by the bank against Dows for conversion. The facts were that McLaren & Company of Milwaukee on an order from Smith & Company, of New York, purchased at Milwaukee three cargoes of wheat, paying therefor, and procured from the plaintiffs a discount of draft drawn on Smith & Company to cover the purchase money and charges. McLaren transmitted to Smith & Company invoice showing the purchase of said wheat deliverable to the account of W. G. Fitch, cashier, ships receiving the wheat for transportation. These bills described McLaren & Company as the shippers and made the wheat deliverable to the account of W. G. Fitch, cashier, Merchants Bank, Watertown,

N. Y. Fitch was the cashier of the plaintiff bank. The bills were indorsed to the Merchants Bank of Watertown, with special instructions not to deliver the wheat until said drafts drawn against the shipments were paid. Smith & Company were proprietors of an elevator at Oswego, known as the Corn Exchange Elevator. The wheat was delivered to Dows & Company who failed to pay the drafts. The court held:

"It is not open to question that McLaren & Company having purchased the wheat and paid for it with their own money became its owners * * *. Having then acquired the absolute ownership McLaren & Company had the complete power of disposition, and there is no pretense that they directly transmitted their ownership to Smith & Company. They doubtless expected that firm to become purchasers from them. They bought from their vendors with that exception. Accordingly, they drew drafts for the price, but they never agreed to deliver the wheat to the drawees unless upon the condition that the drafts should be accepted and paid. They shipped it; but they did not consign it to Smith & Company, and they sent to that firm no bills of lading; on the contrary they consigned the wheat to the cashier of the Milwaukee Bank, and handed over to that bank the bills of lading as a security for the drafts drawn against it—drafts which the bank purchased * * *. It follows that McLaren & Company remained the owners of the wheat notwithstanding their transmission of the invoices to Smith & Company. As owners, then, they had a right to transfer it to the plaintiff as a security for the acceptance and payment of their draft drawn against it. This they did by taking bills of lading deliverable to the cashier of the plaintiff, and handing them over with the drafts when the latter were discounted. These bills of lading, unexplained, are almost conclusive proof of an intention to reserve to the shipper the *jus disponendi* and prevent the property in the wheat from passing to the drawees of the drafts * * *. That the bank never consented to part with its ownership thus acquired, so long as the drafts it had discounted remained unpaid is rendered certain by the uncontradicted written evidence. It sent the drafts with the bills of lading attached to the Merchants Bank, Watertown, accompanied with the most positive instructions by letter and by indorsement on the bills to hold the wheat until the drafts were paid."

In the case of *Sturges vs. Detroit G. H. & M. Ry. Co.*, Michigan, 431 N. W. 706, where suit was instituted growing out of a shipment addressed to the consignor with directions to notify his vendee, the court held (quoting from Syllabus):

"A bill of lading marked 'B. L. attached to draft' sufficiently notified the carrier not to deliver the shipment without surrender of the bill, though the blank form used was what is known as the 'straight' and not the 'Order' form."

In the Course of the opinion the court held:

186 "The attaching of a draft to a bill of lading is of itself the expression of intention on the part of the shipper to retain the right of disposition of the goods until payment of the draft. Even though under such circumstances the purchaser of goods so shipped be named as consignee in the bill, he may not have delivery of the goods until he had paid the draft nor may the carrier deliver them to him without such payment without leaving itself liable to the consignor."

In the case of *Douglas vs. Peoples Bank of Kentucky*, 9 American State Reports, 276, appellee brought suit against appellant, a railroad company, and a third party, seeking to recover judgment against a third party on a note which the third party had executed and delivered, also to recover judgment against the appellant for corn and rye, the title to which was evidenced by its bill of lading executed by appellant as common carrier, by which appellant undertook to deliver to the third party at the City of Louisville the grain mentioned in the bill of lading, which bill of lading showed that the grain was shipped to the order of the shipper per advice of third party and which bill of lading was indorsed by the shipper; that the third party being owner of the bills of lading, transferred them to plaintiff as collateral security to said note: that the appellant railroad refused to deliver the grain to the appellee. Under these facts the court held:

"The grain mentioned in these six bills of lading in controversy was made, by the terms of the bills of lading, deliverable to the shipper's order. Therefore, the title to the grain did not pass to the consignee, the third parties, but remained in the shipper; and he could only pass his title to the grain to the consignee by an indorsement of the bills of lading. And the appellant, the railroad company, had not the right to deliver the grain to the consignee or anyone else, except upon the order of the shipper."

187 The shipper reserved to himself the right of property in the grain and the railroad company undertook to transport it as his property and to deliver it only upon his order. And it was the contract duty of the railroad company so to do; and if the company delivered the grain to the third party without their being the owners of it—which fact should be established by the exhibitions of the bills showing that they were the owners of them by the indorsement of the shipper—the company thereby rendered itself liable to the true owner of the grain for its value."

A similar conclusion was reached by the Supreme Court of Georgia in *Boatman Savings Bank vs. Western and A. R. Co.*, 7 S. E. 125; the facts being that the railroad issued a bill of lading covering a consignment of 900 sacks of flour from the Planet Milling Company, Litchfield, Illinois, consigned to its own order to Atlanta, Georgia, the bill of lading having upon it an indication that J. C. McMillan & Co., were to be notified. On the same day the Milling

Company drew a draft on McMillan Payable to its own order one month after date. It indorsed the draft in blank and negotiated it, together with the bill of lading, also in blank, to the plaintiff and received value. When the bill was presented to the drawee acceptance was refused. Three days thereafter the flour was delivered by the railroad to McMillan. The Court held:

"The consignment being to the order of the consignor, the indorsement of the bill of lading by the consignor was the expression of such an order; and the lines with which it was connected in this contract for carriage and delivery, had no right to deliver to the McMillan Company without production of the bill of lading, or some proper accounting for it."

188 A case somewhat similar to the one at bar was decided in *Pennsylvania R. Co. vs. Stern*, 12 Atlantic, 756. That was a suit by Stern against the railroad company for the value of a certain carload of bones shipped by plaintiffs consigned to themselves at Landenburg, which was delivered to Thos. Whann without surrender of the bill of lading issued upon the consignment. Plaintiffs attached to the bill of lading a draft at 45 days upon Whann for the amount due for the bones and sent it to a corresponding bank for collection. The defendant delivered the bones to Whann without draft being accepted or bill of lading being produced to the company or its agent; the draft was returned to plaintiffs unaccepted and in the meantime Whann failed in business. The court held:

"The only error assigned is to the charge of the court. It was, in substance, that the defendant company could only deliver the merchandise upon the production of the bill of lading, and that, as there was nothing to excuse delivery without a compliance with the terms, the jury should find for the plaintiffs. We see no error in this. The plaintiffs shipped this carload of bones consigned to themselves. At the same time they drew on Whann for the amount at 45 days. There was a bill of lading attached to the draft showing that plaintiffs, the shipper, had consigned said car to themselves * * *. The title in the property remained in the consignors until delivery in accordance with the conditions. Bills of lading are symbols of property and when properly indorsed, operate as a delivery of the property itself, investing the indorsers with a constructive custody, which serves all the purposes of an actual possession, and so continues until there is a valid and complete delivery of the property under and in pursuance of the bill of lading, and to the person entitled to receive same. There can be no delivery except in accordance with the bill of lading."

189 See also the case of *Judson vs. Minneapolis & St. L. R. Co.*, Minn., 154 N. W. 506; where plaintiff sold a car of beans to Thompson Company for a specified price, which the purchaser agreed to pay. They were shipped from Duran, Mich., con-

signed by plaintiffs to the order of Thompson Company, notify Iowa Grocery Company, and plaintiffs were to draw their draft for the price and forward same with the original bill attached to a bank at Kansas City to be presented to Thompson Company for payment, and upon same being paid the bill of lading was to be delivered to the purchaser. Plaintiff delivered the beans to the railroads at Duran and obtained a bill of lading naming the plaintiffs as consignors and consigning the shipment to the order of A. J. Thompson Company. The bill of lading further provided that the surrender of the bill properly indorsed should be required before the delivery of the property. The car was delivered to the Iowa Grocery Company upon the written order of the consignee, but without the production of the original bill of lading. Plaintiff sued the defendant for conversion. In affirming the decision in favor of plaintiff, the court held:

"The provisions of a bill of lading under which the shipment is made govern the rights of both carrier and shipper. The bill of lading becomes the symbol of the property described therein and the transfer of the bill of lading transfers the property. Therefore, while such bill of lading is outstanding the carrier delivers the shipment at its peril if it turns out that under the terms and provisions thereof the one to whom delivery was made was not entitled thereto * * *. In the instant case plaintiffs were the actual owners; the title never passed to the consignee. They also retained under their control the symbol of ownership, the bill of lading."

190 A similar result was reached by the South Carolina Supreme Court in the case of General Electric Company vs. Southern Railway Company, 110 A. R. S. 601. That was a suit by plaintiff for the value of a motor. The bill of lading was to the order of the General Electric Company, notify Cotton States Electric & Machine Co. The bill of lading together with draft attached drawn by the General Electric Co., upon the Cotton States Electric & Machine Company and forwarded to the bank at destination, where payment was refused and bill of lading and draft returned to plaintiff. Plaintiff presented the bill of lading to the defendant and demanded the motor, which demand was denied because defendant had already delivered the property to the Cotton States Electric & Machine Co., without the delivery or presentation of bill of lading. In holding the defendant liable the court said:

"The machinery when received by the defendant, and it well knowing that the same was subject to the bill of lading in the plaintiff's hands, could not be delivered with safety by the defendant to the Cotton States Electric & Machine Company. The character impressed by law is distinct and unvarying. Any effort to surrender a shipment at variance with the bill of lading is at the peril of the defendant. He must be prepared to pay the full value of the shipment or take upon himself the burden of proving himself justified in so doing * * *. Under these circumstances it was

the duty of the defendant to await the production of the bill of lading and let the indorsement thereon govern the delivery of the shipment * * *

One of the earlier cases holding the carrier to a strict accountability in making delivery is that of *Forbes vs. Boston & Lowell Railroad*, 133 Mass 154. That was a case for conversion of corn shipped by Gallup, Clark & Company, grain dealers in Chicago, in response to an order from Foster & Company of Boston, the former forwarding to Boston fifty cars of corn, and on the shipping of the corn a bill of lading was issued consigning the same to the order of Gallup, Clark & Company, at Boston. The consigner drew a draft upon Foster & Company for the price of the corn, and attached to it the bill of lading, and forwarded both to a bank in Boston. Foster & Company, drawees, paid the draft, and the bill of lading and draft were delivered to them. On receiving the draft and bill of lading Foster & Company endorsed them to plaintiffs, as security for an advance then made by plaintiffs to the full amount of the draft, and they have held them ever since. The corn was transported by defendants to Boston, where it remained in the cars for some time, when by orders of Foster & Company it was shipped to Cork and exported to Ireland. Foster & Company did not produce and present to the defendant railroad the bill of lading, but represented that it was in their possession. In holding the defendant liable, the court said:

"Upon these facts it is too clear to admit of any doubt, that, by the transfer of the draft and bill of lading by Foster & Company to the plaintiffs, the title and property in the corn passed to them. The bill of lading, though not strictly a negotiable instrument like a bill of exchange, was the representative of the property itself; it was the means by which the property was put under the power and control of the plaintiffs, and the delivery of it was for most purposes equivalent to an actual delivery of the property itself * * *. It is settled that any misdelivery of property by a carrier or warehouseman to a person unauthorized by the owner or person to whom the carrier or warehouseman is bound by his contract to deliver it, is of itself a conversion, which renders
192 the bailee liable in an action of tort in the nature of trover, without regard to the question of his due care or negligence. By the bill of lading, and by the way bill which was sent to the defendant in the place of a duplicate bill of lading, the corn was to be delivered to the order of Gallup, Clark & Company. The defendant contracted to deliver it to such person as Gallup, Clark & Company should order, and could not without violating its contract deliver it to any other person. By delivering it to Foster & Company, therefore, the defendant became liable for a conversion, unless it shows some valid excuse."

See also the *Arkansas Southern Ry. Co. vs. German National Bank*, Ark. Supreme Court, 92 S. W. 522; which was a case by the

bank against the railroad to recover the value of cotton shipped on bills of lading issued by the railroad company and consigned to the bank; the cotton never having been delivered. Alphin & Lake Cotton Company were cotton dealers at Little Rock and the principal owners of the compress at El Dorado. They purchased the cotton at Bernice, Louisiana, where payment was made by the bank of Bernice and shipped in its name over the railroad to El Dorado. Bill of lading was issued to the shipper in which it undertook to deliver the cotton to the shipper's order at its destination. They were forwarded to the bank of Little Rock with draft on Alphin & Lake Cotton Co. attached for collection. When the drafts and bill of lading arrived at Little Rock, Alphin & Lake Cotton Co., would draw drafts for the amount on the bank of Little Rock, which would pay the same by taking up the original drafts for the price of the cotton, and would retain the bills of lading as security for the amounts and all other indebtedness of the Alphin & Lake Cotton Company owed that bank. The bills of lading were all to shipper's order, care of compress El Dorado, Arkansas, notify

193 Alphin & Lake Cotton Company. The railroad had no warehouse or place for delivery or storage at El Dorado. The railroad delivered all cotton which came over its road at the compress. In delivering the cotton to the compress company, no directions were given to it than contained in a memoranda book kept by the railroad, and the cotton was treated as belonging to Alphin & Lake Cotton Co., and delivered without taking up the bill of lading. Lake applied to the plaintiff for a loan, which bank advanced a large amount of money on the bill of lading for the cotton in question. At the time Lake applied for the loan the bills of lading were in the hands of the bank at Little Rock.

Draft was drawn by the Cotton Company on the plaintiff bank in favor of the bank of Little Rock with bills of lading attached, which was presented by and paid to the bank of Little Rock. At the time of the bills of lading were the property of the Bank of Little Rock, and Lake was permitted to take them from the Bank of Little Rock to the German National Bank, with the understanding that they or the money for them should be returned to the bank of Little Rock. The German National Bank lost the cotton. It was delivered to other parties. In holding the railroad liable, the court said:

"At common law a bill of lading is a muniment of title to the goods or property therein specified, is a symbol or representative of the goods, 'when properly indorsed and delivered, with the intention of passing the title to them, is a symbolic or constructive delivery of the goods themselves; and when assigned, the carrier, having notice of the assignment, becomes bound to deliver the goods to the assignee. If the goods by the terms of the bill of lading, are deliverable to the order of the shipper, the carrier should not deliver except upon the production of the bill of lading properly indorsed by the shipper for this is notice to the carrier that the shipper intends to retain in his power the ultimate disposition of the goods * * *.' The responsibility of the carrier for the goods

continues after their arrival at the place of destination until they are ready to be delivered, and the owner or consignee has had a reasonable time and opportunity to examine them and take them away * * *. He is responsible, either as carrier or warehouseman, until the goods are properly delivered. The bill of lading is evidence of that obligation."

The court continued:

"Appellant failed to deliver the cotton on the surrender and cancellation of the bills of lading issued therefor, and under the statutes of this state, is liable to appellee for damages. But appellant insists, according to the bills of lading, it was to transport the cotton to El Dorado and deliver it to the care of the compress company, and that when it did so, it discharged its whole duty, and was thereby relieved of further responsibility. If this contention be correct, the stipulation in the bill of lading, by which appellant undertook to deliver the cotton to the order of the shipper, was meaningless. According to the stipulation it could not have delivered the cotton except upon the production of the bills of lading properly indorsed; 'for this was notice to the carrier that shipper intended to retain in his power the ultimate disposition of the goods'."

A well considered case covering one of the points involved is that of *Erwin vs. Harris*, Georgia Supreme Court, 13 S. E. 513. The facts were that Erwin wrote Harris from Pilot, Texas, that he had five carloads of oats to sell, sending Harris a sample, naming the price. Harris telegraphed Erwin that he would take the five loads at 21c. per bushel, like the sample, free on board cars at Pilot Point. This offer was accepted by Erwin. Erwin shipped promptly two carloads, sending drafts with the bill of lading attached. The oats were consigned to Harris at Macon, Georgia, and the bill of lading attached to the drafts was taken by Erwin to his own order and sent by him to a bank in Macon. The bank presented the draft to Harris who refused to pay on the ground that he had a right to inspect the oats before paying. It was contended that when Harris made the offer, and it was accepted by Erwin in Texas, and Erwin placed the two carloads of oats free on board the cars that amounted to a delivery of the oats to Harris in Texas. The court held:

"The general rule is that when one orders goods from a distant point, to be shipped by a common carrier, the order is accepted and the goods shipped, the delivery to the common carrier is a delivery to the purchaser, the common carrier being the agent of the purchaser to receive them; and when this is done the title, without more, passes from the vendor to the vendee. If, however, the vendor of the goods is not satisfied of the solvency of the purchaser, or is doubtful thereof, or wishes to retain title in himself, he may vary this rule when he makes the consignment and delivers the goods to the carrier, by taking a bill of lading from the carrier to his own

order. When the vendor does this, it is evidence that he does not part with the title of the goods, shipped, but retains the same until the draft which he sends with the bill of lading is accepted or paid; and when the title is thus reserved in the vendor or the consignor, the carrier is his agent, and not the agent of the consignees, and the risk is the consignor's, and not the consignees'."

Following the conclusion and reasons therefor, as expressed in the Erwin and Harris case, no right to or title in the cattle passed to the First National Bank or the Peters Commission Company on delivery to the carrier at El Paso, and such carrier was not the agent of the consignee, the First National Bank, or the intending purchasers, Peters Commission Company, but was the agent of the consignor, the City National Bank, to whom it was accountable for delivery in accordance with the instructions and agreement.

See, also, case by the same court Southern R. R. Co. vs. Strozier & Waters, 73 S. E. page 43. There plaintiff sued the railroad company to recover bed lounges shipped by the Johnson Manufacturing Company at Fayette, N. C., to its order at Savannah, Georgia, with directions to notify Strozier & Waters. Strozier & Waters had given an order for the goods, depositing \$10.00 on the cost price. Finding that purchasers had no commercial rating, the Manufacturing Company made the shipment to itself at Atlanta, with order to notify the purchaser, and attached a bill of lading to sight draft drawn on the purchaser, and placed it in the bank for collection. Plaintiff, and being purchaser, refused to pay the draft and the railroad company refused to deliver possession of the goods to them unless the bill was surrendered, and upon this refusal plaintiff instituted suit, claiming title to the shipment. The question involved was thus stated by the court:

"Where a vendor makes a shipment by means of a common carrier, to his own order, with directions to notify a third person at destination, and the bill of lading is attached to a sight draft for collection drawn on such third person, does any title pass to such third person until payment is made of the draft, or rightful possession of the bill of lading obtained?"

The court held:

197 "Unquestionably, it is a general rule that delivery to the carrier of goods purchased is delivery to the consignee; but this general rule may be varied by manifest exception thereto made by the vendor at the time of shipment. At the time of shipment in this case the Johnson Manufacturing Company expressly reserved title to the shipment by taking a bill of lading to its order and attached a sight draft to the same for collection * * *."

"* * * Johnson Manufacturing Company had reserved title in itself until the draft was paid. The carrier had knowledge of the method of shipment. It had the absolute right to refuse to deliver

the shipment, made, as it was, without the surrender of its bill of lading. If it had delivered the shipment to the consignees without the bill of lading it would have been in law liable to the vendors for any consequent loss, for the carrier is bound to see that it delivers a shipment only to the proper person designated by the consignor * * *."

Let *is* be supposed that the defendants in the case at bar had refused to deliver the cattle to the Peters Commission Company, who were situated as the facts below disclose. The Commission Company was not mentioned in the bill of lading; they did not have or present to the carrier the bill of lading. On issues being joined could it be contended that the Commission Company could obtain possession from the carrier of said cattle or recover judgment for the carrier's failure to deliver? To put the hypothetical question or case is but a refutation of the same—yet if it is apparent—and it is, that the Peters Commission Company could not demand as their right or require a delivery from the carrier, what authority or right did the carrier have in delivering to the Peters Commission Company?

A thoroughly considered case is that of the Midland National Bank vs. Missouri Pacific Ry. Co. (Missouri), 53 Am. State Reports, 503, which was a case by the Midland National Bank, as pledgee of 20 bills of lading issued by the defendant for failure to deliver to it 20 cars of grain covered by the bills of lading. The case was tried by a jury and after the testimony was all in a peremptory instruction for the plaintiff was given by the court. It was alleged that the defendant received the cars of grain at Paola, Kansas, consigned to the order of the shipper at Kansas City, Missouri; that by the terms of the bills of lading the cars were to be delivered to the Courier Commission Company at Kansas City; that the Commission Company negotiated a loan of plaintiff and pledged said bills of lading duly indorsed as collateral security. In the defendant's answer it alleged that three bills of lading were issued for each car and that after the issuance of the bills, he, in good faith, delivered the grain covered by the bills of lading to the owner thereof, the Courier Commission Company on the surrender to it of one set of the bills of lading by the Commission Company, but that subsequent to the delivery of said grain by it to the commission company, the plaintiff obtained possession of the bills sued on. The defendant also pleaded a custom whereby the owner of grain shipped to said city was required to receive and take possession of the same within six days after its arrival, of which custom plaintiff was aware. In deciding the same, the court said:

"The rights of the parties to this litigation must be determined by the contract of affreightment issued by the defendant company to the Courier Commission Company, unless the plaintiff, or some holder of the bills before it, had done something, with the knowledge of plaintiff, whereby defendant was discharged from its obligation; and no custom practiced and maintained by the defendant and other railway companies at Kansas City can

prevail, against the express language of their contract of affreightment, to affect the rights of the holder by endorsement thereof, or in anywise limit the liability of the defendant thereon, unless such custom had been exercised, and plaintiff had purchased or received the bills with the knowledge of that fact. The fact that a rule was in force among the railroads at Kansas City at the time of this transaction, and, further, that from its general enforcement and practice, a custom had thereby been established, that was known to the plaintiff, to the effect that grain and produce shipped to Kansas City were to be received by the consignee within six days from the date of its arrival, would not justify or excuse the misdelivery of the goods by defendant, or relieve against the express language of the contract of affreightment to deliver to the shipper's order.' If the plaintiff did nothing to mislead the defendant, it had the right to rely upon the fact that it held the bills of lading, and that, according to the ordinary course of business, the grain could not be obtained except upon their production * * *. In issuing these bills of lading the defendant stated to the business and commercial world: 'We hold 20 cars of grain delivered to us by the Courier Commission Company, which will be retained by us for the company or its assigns, by indorsement in writing, and none of the grain therein, will be delivered to anyone, except on the surrender and cancellation of those bills of lading.'

"And, now, after thus announcing to the world these facts by the issuance of the bills of lading, which are symbols of the property in its custody, and the muniments of title thereto in the hands of the holder thereof, can it afterward say to the holder of these symbols, which represent and stand for the property itself: 'True we said we had the property, and that we would hold it subject to be delivered only to the holder of the instruments issued by us, but we ought not now to be held to that agreement, because we have carelessly, but in good faith, delivered the same to the original shipper' * * *."

200 From the undisputed facts in case at bar it may be summarized in the following manner:

(a) The plaintiff bank was the owner and shipper of the cattle and consignor in the bill of lading.

(b) That the title to the cattle or right to their possession never passed from the City National Bank to the Peters Commission Company. (That the title did not pass is shown by the manner in which the shipments were handled, the City National Bank at all times drawing a draft on the Peters Commission Company and sending draft with an order bill of lading to the First National Bank in Kansas City with instructions to deliver the bill of lading on the payment of the draft by the Peters Commission Company.)

(c) That the bill of lading was an order bill of lading.

(d) The bill of lading was never indorsed from the City National Bank to the Peters Commission Company, nor received by the Peters Commission Company.

(e) The bill of lading was not presented by the Peters Commission Company when the carrier made the delivery.

(f) The plaintiff bank has to this time the possession of the bill of lading and the unpaid draft.

(g) That the carrier in issuing the bill of lading was charged with notice of its terms and had it followed the conditions of the bill of lading and required the production of the bill duly indorsed, there would have been no delivery. (Clearly the carrier made no inquiry or demand of the Peters Commission Company for his authority or ownership of the bill of lading, or his right to the possession of the cattle.)

201 (h) That the cattle were delivered by the carrier to the Peters Commission Company, and the plaintiff has not received payment of the draft or the purchase price of the cattle.

From the foregoing summary, and which we present as being the fair and impartial deductions from the fact and authorities covering the case, can it be said that there is anything in the evidence authorizing or permitting the delivery to the Peters Commission Company? As stated by an eminent text book writer:

"The law will allow in fact no excuse for a wrong delivery, except the fault of the shipper himself."

In the case at bar, can it be asserted that the City National Bank, the shipper, was at fault? The defendants pleaded custom. There was no evidence showing that either the City National Bank or the First National Bank of Kansas City had any knowledge of the custom to deliver at variance with the bill of lading. The custom alleged and proven by the defendant was that deliveries were made on the way bills. It is quite doubtful whether custom can vary or control or overcome clear and positive terms of an unambiguous contract or bill of lading. We are inclined to the position that it cannot. Assuming that it was pertinent to the issues, there was no evidence showing that the First National Bank had knowledge of the custom. Even though the First National Bank knew of the custom, its knowledge would not be chargeable to the City National Bank, the shipper and owner of the cattle. Yet, there being no evidence that

202 either the First National Bank or the City National Bank knew of such custom, and in absence of knowledge or a custom so general that they must have knowledge of the same, they are not and should not be affected by such alleged custom.

It was also contended that a few of the prior shipments had been delivered to the Peters Commission Company before they had paid the draft. Admitting this to be a fact, there was no evidence showing that the City National Bank knew of such facts. If such facts

existed, they were at variance with and contrary to the positive instructions given by the City National Bank to the First National Bank when the draft and bill of lading were forwarded to the latter bank for collection. Assuming that such prior deliveries were made to the Peters Commission Company by the carrier before the drafts were paid by the Commission Company, and that the First National Bank of Kansas City knew thereof, such knowledge on the part of the First National Bank, or its actions in relation thereto, would not be binding upon the City National Bank, who had no knowledge of such facts or conditions. The First National Bank of Kansas City was merely a special agent or a collecting agent for the City National Bank, the shipper and owner of the cattle, and the authority of the First National Bank is measured by the limitations enclosed in the letter of instructions from the City National Bank: "To deliver the bill of lading to the Peters Commission Company on the payment of the draft." By reason of these facts we are confident of two propositions:

203 (a) A custom cannot justify a delivery at variance with and contrary to the manifest terms of an unambiguous bill of lading.

(b) Knowledge of a special agent, as the First National Bank, in the instant case, or deliveries at variance with the bill of lading, and before the payment of the drafts in previous shipments does not bind a principal who had no knowledge of such facts and conditions.

The rule is well stated in Vol. 4, Ruling Case Law, entitled "Bills of Lading," Article 27, as follows:

"An express contract of the parties is always admissible to supersede or vary or control a custom or usage; for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled or varied or contradicted by a usage or custom; but that would not only be to admit parol evidence to control, vary, or contradict written contracts, but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention, to control, vary, or contradict the most formal and deliberate written declarations of the parties."

A similar conclusion was reached by the United States Supreme Court in the case of *Bernard vs. Dunham*, 19 L. E. p. 990, quoting:

"Though usage is often resorted to for explanation of commercial instruments, it never is, or ought to be, received to contradict a settled rule of commercial law."

To the same effect is the case of *N. Pa. R. R. Co. vs. the Commercial National Bank*, 31 L. E. 291, where similar questions were as in the case at bar. There the court held:

"The fact that the railroad company at Philadelphia had been in the habit of delivering cattle transported by it, to the Blaken-

through the droveyard company, without requiring the production of any bill of lading or receipt of the carrier given to the shipper, of any authority of the shipper in no respect relieved the company from liability for the cattle in this case. It was not shown that the shipper or the bank which took the draft against the shipment, or its correspondent at Newton in Pennsylvania, had any knowledge of the practice; and, therefore, if any force be given to such a practice in any case, it be given in this case where the party sought to be affected had no knowledge of its existence. In *Bank of Commerce vs. Bissell*, 72 N. Y. 615, the defendants offered to prove a custom in New York to deliver property under bills of lading to the person who was to have notice of its arrival. The evidence was rejected and the Court of Appeals held that there was no error in rejection, stating that if the custom were established it would not subvert a positive, unambiguous contract."

In the case of *Weyand vs. A. T. & S. F. Ry. Co.*, Iowa, 9 A. S. 505, the findings of fact on the question of custom were analogous with the undisputed evidence in the case before this court. In the *Weyand* case the plaintiffs sold certain canned goods to one Evans, of Pueblo, Colorado, consigning the shipment to himself, at Pueblo, and drew a draft on the purchaser for the price of the goods and sent the same to the bank for collection with draft attached and with instructions to the bank to deliver the order to the purchaser on the payment of the draft. The consignor at the same time sent one copy of the bill to the purchaser, which copy was not indorsed or signed by the consignor. Without payment of the draft Evans obtained the goods from the railroad on presenting the bill of lading which he had received from the consignor. It was insisted by the railroad that the delivery to Evans was made in accordance with the custom at Pueblo and that the contract of shipment must have been made with reference to that custom. The Lower Court found that by local custom at Pueblo, goods shipped over the railroad line to that place were delivered to the person who held the bills of lading, but that the custom was not general and plaintiff had no knowledge of it. The court held:

"The contract of shipment required defendant to deliver the goods to the canning company, and we question the right of defendant to vary this by showing a custom in conflict with it. The contract was not ambiguous, and required no explanation. But where a custom may be shown, it must appear that it was so general that the parties to the contract will be presumed to have contracted with reference to it * * *. The court below not only found that the custom pleaded was local, but that plaintiff had no knowledge of it."

Neither the City National Bank nor the First National Bank of Kansas City had any knowledge, as far as the record goes, of a custom existing at the Kansas City Stock Yards to the effect that deliveries of cattle were made on way bills and stubs of way bills. In the absence of any evidence showing knowledge on the part of the

plaintiff, the consignor and owner of said cattle, of the existence of such custom, which custom was purely local and applicable only to the Kansas City Stock Yards, the plaintiff, a banking corporation doing business in the City of El Paso, Texas, is not bound by nor chargeable with said alleged custom. Nor can the duties and obligations of the carrier entered into at El Paso, Texas, with the City National Bank, be changed or abridged by the local custom at Kansas City.

It will be contended by the appellees that the delivery in the present case was made in the same manner that prior deliveries had been made, and that the First National Bank, who was the agent of
206 the plaintiff, had knowledge of the previous deliveries and the manner in which they were delivered; that the First National Bank of Kansas City, as the agent of the plaintiff, had permitted or acquiesced in previous deliveries of cattle before the payment of the drafts, and that the carriers relied upon the acquiescence of the First National Bank therein, and such facts were reasonably sufficient to induce the belief on the part of the delivering carrier that the Peters Commission Company was duly authorized to receive said cattle for the First National Bank. Pretermitted for the present the contention that a delivery could not have been made either to the Peters Commission Company or the First National Bank, without violating the terms of the bill of lading, it will be assumed that the First National Bank ratified and acquiesced in previous deliveries before the payment of the drafts, and the actions of the said bank were reasonably sufficient to induce the belief on the part of the delivering carrier that the Peters Commission Company was duly authorized to receive said cattle for the First National Bank of Kansas City. It is our position that the First National Bank of Kansas City was a special agent, authorized to release the cattle to the J. P. Peters Commission Company upon the payment of the draft drawn upon said Commission Company. That the bill of lading was to be delivered by the First National Bank to the Peters Commission Company when the draft was paid. No other or additional authority was granted to the First National Bank. The evidence on this point is clear and
undisputed. The First National Bank, being the special
207 agent, employed and authorized by the City National Bank to perform a special and clearly defined duty, to-wit: to receive payment of the draft drawn by the plaintiff bank on the Peters Commission Company, and to deliver to said Commission Company on receipt of said payment the bill of lading issued to the plaintiff by the carrier, any acts or conduct or knowledge of the First National Bank in excess of such authority granted to it by the City National Bank cannot bind the City National Bank. Inasmuch as there is nothing in the evidence showing that the City National Bank held out the First National Bank as possessing any other authority than the actual authority delegated to the First National Bank, the question of ostensible authority or agency by estoppel does not arise.

It was so held in the case of *Dows vs. National Exchange Bank of Milwaukee* (23 L. E. p. 218), the facts in said case being: The bills of lading were indorsed to the Milwaukee National Bank of Watertown, with special instructions thereon not to deliver the wheat until

the drafts drawn against the shipments were paid. The Merchants Bank, through its cashier, wrote letters to the proprietors of the Corn Exchange Elevator and *the* A. F. Smith & Co., proprietors of the Corn Exchange Elevator, enclosing order for the delivery of each one of the cargoes, with orders to hold the same until the payment of the drafts drawn against the cargoes. None of the drafts except the first one were paid. Smith & Company on receiving the bills of lading sent the same with sight drafts through banks in New York City to Dows & Company, who paid said last mentioned drafts and received the bills of lading at time of payment. Under these facts, the Court held:

208 "What is there upon which to base the inference that it was intended A. F. Smith & Co., should become immediate owners of the wheat and be clothed with the right to dispose of it at once? Such an inference is forbidden, as we have already said, by the bills of lading made deliverable to W. G. Fitch, cashier of the Milwaukee Bank; and it is inadmissible in view of the express orders given by that bank to their special agent, the Merchants Bank at Watertown, directing it to hold the wheat subject to the payment of the drafts drawn against it. No intent to vest immediate ownership in the drawees of the draft can be implied in the face of these express arrangements and positive orders to the contrary. It is true that A. F. Smith & Co. were the proprietors of the Corn Exchange Elevator, and that the wheat was handed over to the 'custody of the elevator' at the direction of the Merchants' Bank; but it cannot be claimed that that was a delivery to the drawees under and in pursuance of their contract to purchase. The Merchants' Bank, having been only special agents of the owners, had no power to make such a delivery as would divest the ownership of their principals."

The same principal is announced in the case of Second National Bank vs. Cummings, Tenn., 18 S. W. 117:

"A special agent, authorized to deliver a bill of lading only upon payment of the bill of exchange drawn against the goods and attached to the bill of lading, cannot bind his principal by a delivery without such payment. The person thus acquiring a bill indorsed in blank has been held not to acquire any title to the goods as against the principal."

"The authority of a special agent must be strictly pursued, and those dealing with him must at their peril determine the extent of his authority, for, as in the case of acts and transactions of a general agent, a special agent cannot bind his principal by acts outside the scope of his authority." (31 Cyc., p. 1341.)

A case that is as clearly in point as can usually be found is that of Stollenwerck vs. Thatcher, 115 Mass. p. 224. Suit was instituted for conversion of cotton; the plaintiffs being cotton buyers in Mobile, made arrangements with Jos. I. Baker, a cotton broker in Boston, by which they agreed to pay him upon such orders on them as he should obtain from his customers, fifty cents per bale. Receiving an order from a third party, Baker telegraphed

plaintiffs to buy 200 bales. Plaintiffs replied, refusing to negotiate on any other basis than bill of lading with draft attached. The cotton was brought in Mobile by the plaintiffs, who drew bill of exchange on third parties against the cotton, took the bill in their own name, indorsed it in blank, attached it to the bill of exchange, procured the letter to be discounted at a bank, informed Baker of what they had done, and instructed him, on receiving the draft and bill of lading, to hold the bill of lading until draft was paid. The Mobile bank forwarded draft to a bank in Boston, which presented the same to third party, who accepted same. The bank delivered the bill of lading to Baker, and he afterwards delivered to third party, who obtained the cotton from carriers and pledged the cotton and delivered the bill of lading to the defendants as security for advances. On these facts the court held:

"Baker and the plaintiffs were not partners as between themselves, and Gray & Company (third parties) did not deal with Baker as a partner of the plaintiffs. His relation to the plaintiffs was that of a broker only. He looked to them and not to the cotton for the payment of his commission. The case is not within the general statutes. Baker was not a factor or a general agent, intrusted with the goods for the purpose of sale; but a special agent with positive and restricted instructions to receive the bill of lading on the
210 acceptance of the draft, hold the bill of lading and the cotton until the draft was paid, and then deliver them to Gray & Company. He had no right of possession of the bill of lading or the cotton for any other purpose, and no title in or lien on the cotton * * *. But so long as the bill of lading remains in the hands of the original party, or of an agent intrusted with it for a special purpose, and not authorized to sell or pledge the goods, a person who gets possession of it without the authority of the owner, although with the assent of the agent, acquires no title as against the principal * * *. In the present case, Baker, being a special agent authorized to deliver the bill of lading only upon payment of the bill of exchange drawn against the goods and attached to the bill of lading, could not bind his principals by a delivery made without such payment. To hold otherwise would be to allow a person, intrusted with goods merely for the purpose of collecting the price and then delivering them, to sell them on credit. The authority of Baker, being special and limited, could not be enlarged by his own declarations."

Applying these principles to the facts involved here, can it be plausibly contended that the First National Bank of Kansas City, a special and not a general agent for the City National Bank, with authority only to release the cattle upon the payment of the draft, by their acts in permitting or acquiescing in deliveries of previous shipments to the Peters Commission Company before the payment of the drafts could bind or in any manner waive the rights of their principal, the City National Bank, the latter having no knowledge of such transactions? It would also follow that any knowledge (of which there is nothing in the evidence to impute knowledge) of

the First National Bank of the custom prevailing in Kansas City is not binding upon or imputable to the City National Bank of El Paso, the latter being ignorant of said custom.

211 From the trend of the adjudicated decisions and writings of the authorities on this subject, in the absence of Congressional legislation, we submit that the railroads did not deliver the shipment of cattle involved herein to the proper person, and are liable for the conversion thereof, to the plaintiff. Our position is, however, strengthened and forfeited, and we believe rendered indisputable by the Act of Congress enacted June 29, 1906, known as the Carmack Amendment to the Hepburn Act (34 Stat. L. 594), as follows:

"That any common carrier, railroad or transportation company, receiving property for transportation from a point in one state to a point in another state, shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, etc." (Fed. Stat. Ann. Supplement 1909, p. 273.)

In the case at bar the receiving carrier executed and issued a receipt and bill of lading to the plaintiff, the City National Bank, who became at such time, and has continued to this time to be, the lawful holder thereof and according to the language of the statute just quoted the plain and usual interpretation, the conclusion is irresistible that the carriers are liable to the plaintiff herein for the loss and damage caused by them. On of the evident principles of said legislation was to require uniformity in the issuance of receipts and bills of lading by the carriers, as well as to protect and safeguard the rights and interests of the lawful holder of the bills of lading so issued in pursuance of said legislation. As a consequence of said enactment, any lawful holder of a bill of lading is
212 protected in his investment and his property rights growing out of the same and his possession is conclusively secured, in that the carrier cannot deliver to another than the lawful holder of the bill of lading. Such seems to have been the position taken by the Supreme Court of Washington in the case of Coover et al., vs. Spokane P. & S. Ry. Co., 141 Pac. 324 where the plaintiffs delivered to the defendant at Vancouver three boxes of goods for shipment to the Mutual Manufacturing Company at Canton, Ohio, and when receiving the goods, the railroad issued to the plaintiffs a bill of lading reciting that the goods were received for transportation to Canton, Ohio, and naming the Manufacturing Company as consignee thereof. On receiving the bill of lading the plaintiffs sent it to the consignee by mail, and some ten days thereafter the consignee returned the bill of lading to plaintiffs stating they would not receive the goods. Plaintiffs thereupon notified the defendant of the attitude of the consignee and gave directions to have the goods returned to them at Vancouver and at the same time surrendering to the railroad the bill of lading. The Pennsylvania Railroad Company, and who was the delivering carrier, did not follow the instructions to return the goods to plaintiffs, but in a short time thereafter delivered the goods

to the consignee. The goods were lost to the plaintiffs and this suit was instituted against the defendant to recover the value. In discussing the case the court stated:

"We think the cases are practically uniform to the effect that a carrier delivers consignee goods to the consignee without the production of the bill of lading at its peril, when it had knowl-
213 edge, or reasonable cause to believe, that the consignee did not have the full beneficial interest in the goods * * *

We think, moreover, this question is concluded by the Federal Statute. The amendment of the act to regulate commerce provides: That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass.' (34 Stat. at Large, p. 595.) This provision of the statute, it will be observed, makes it the duty of common carriers receiving property for interstate transportation to issue a receipt or bill of lading to the consignor of such property, and makes it liable to any lawful holder of such receipt or bill of lading for any loss, damage or injury to such property caused by it, or by any common carrier to which the property may be delivered, or over whose lines such property may pass. Clearly the statute recognizes the lawful holder of the bill of lading as the person entitled to receive the shipment, regardless of whom may be named as consignee and this being true, the carrier delivers the goods transported at its peril, when it delivers without the production of the bill of lading. It cannot, we think, be questioned in this instance that the consignors of the goods were the lawful holders of the bill of lading at the time of the delivery of the goods to the consignee."

Appellant's Second Assignment of Error.

(Paragraph 5, Motion for New Trial.)

The court erred in rendering judgment in favor of the defendants because under the pleadings and the bill of lading introduced in said cause covering the shipment involved, and the evidence and the findings of the jury show that the defendants were not entitled to a verdict in their favor.

214 Proposition under the Foregoing Assignment.

The bill of lading issued by the receiving carrier to the plaintiff having provided that the carrier would deliver said cattle to the plaintiff, its order or assigns, and the undisputed evidence having shown that no such delivery was made, and the findings of the jury having failed to show that the plaintiff, shipper of said cattle, was at fault,

caused said mis-delivery, the defendants were not entitled to a verdict in their favor.

Statement.

See statement under first assignment of error, pages 7 to 18 this brief.

Also, see verdict of the jury, pages 28 to 31 Transcript, as follows:

"Question Number One. Do you find from the evidence, by a preponderance thereof, that contemporaneous with, or just prior to the execution and delivery of the bill of lading covering the shipment of cattle in question in this suit it was mutually agreed by and between J. A. Peters, acting for the City National Bank, and the agent of the receiving carrier at El Paso, Texas, that such cattle should be consigned by the bill of lading to the First National Bank of Kansas City, Missouri, care of the J. P. Peters Commission Company?

"Answer. Yes.

"Question Number Two. Do you find from the evidence by a preponderance thereof, that when the bill covering the shipment of cattle in question was issued that the same, by the mutual mistake of J. A. Peters, acting on behalf of the City National Bank, and the said agent of the defendant carriers acting in their belief omitted to state in the bill of lading in accordance with their mutual agreement, that the cattle were consigned to the First National Bank care of the J. P. Peters Commission Company, such agreement there was?

"Answer. Yes.

"Question Number Three. Do you find from the evidence, by a preponderance thereof, that J. A. Peters, directed the agent of the defendant carriers receiving the cattle at El Paso, shipment of which in question, to place on the way bill that the cattle were consigned to the First National Bank of Kansas City in care of the J. P. Peters Commission Company?

"Answer. Yes.

"Supplemental Question by Court. Was such direction on the part of J. A. Peters to said agent, if you have found he gave such direction, contemporaneous with or subsequent to the execution and delivery of the bills of lading covering this shipment of cattle?

"Answer. Contemporaneous with.

"Question Number Four. Do you find from the evidence by a preponderance thereof, that in the case of the shipments of cattle made prior to the shipment in question, said prior shipments consigned by bills of lading by the City National Bank of El Paso, Texas, to the First National Bank of Kansas City, that the delivering carrier delivered same to the J. P. Peters Commission Company at Kansas City, prior to the payment of the drafts drawn on the Peters Commission Company attached to the bills of lading?

"Answer. Yes.

"Question Number Five. Do you find from the evidence, by a preponderance thereof, that in cases of prior shipments of cattle inquired about in question Number Four, that the said First National

Bank had notice prior to the arrival of the shipment in question herein, that the delivering carrier had delivered such prior shipments or some of same to the J. P. Peters Commission Company prior to the payment of the drafts drawn on the said Peters Commission Company for such prior shipments, if any, of them had been delivered prior to the payment of the drafts, and said bank ratified and acquiesced therein?

"Answer. Yes.

Question Number Six. Do you find from the evidence, by a preponderance thereof, that in reliance upon the ratification or acquiescence of the First National Bank of Kansas City in the delivery of said prior shipments of cattle to J. P. Peters Commission Company before the payment of the drafts attached to the bills of lading, if said shipments had been delivered prior to the payment of the drafts, and the said bank did not ratify or acquiesce therein, that the delivering defendant delivered the shipment of cattle in question in this suit to the J. P. Peters Commission Company without the payment of the draft attached to the bill of lading?

"Answer. Yes.

Question Number Seven. Do you find from the evidence, by a preponderance thereof, that the acquiescence or ratification of the First National Bank of the delivery or prior shipments before payment of the drafts attached to the bills of lading, if prior shipments were so delivered and the First National Bank acquiesced and ratified same, was reasonably sufficient to induce the belief on the part of the agent of delivering defendant carrier that said J. P. Peters Commission Company was duly authorized to receive said cattle for the First National Bank of Kansas City?

"Answer. Yes.

Question Number Four Requested by Plaintiff. Do you find from the evidence, by a preponderance thereof, that had such bill of lading recited that the cattle were to be delivered to the First National Bank care of the J. P. Peters Commission Company, that plaintiff could and would have notified the defendants, prior to the delivery to the J. P. Peters Commission Company, not to deliver said cattle without the payment of the draft in the First National Bank of Kansas City?

"Answer. No."

Authorities.

See authorities under Appellant's First Assignment of Error.

Argument.

The position taken by the appellant under its First Assignment of Error is applicable to this assignment. If the defendants were guilty of conversion when they made the delivery of the cattle to the Peters Commission Company, regardless of the findings of the jury on the particular (and wholly immaterial) issues submitted for their determination by the court, the trial court committed error in rendering judgment for the defendant.

Appellant's Third Assignment of Error.

(Paragraph 24, Motion for New Trial.)

Under the terms of the bill of lading, plaintiff was entitled to recover, and such bill of lading could not be altered or controlled by any instrument of the said Peters, the carrier's agent, and the plaintiff having accepted said bill of lading and relied thereon, the carrier is bound thereby, and the carrier is estopped, as a matter of law, from showing a contract or instructions at variance with the terms of said bill of lading.

Appellant's First Proposition under the Foregoing Assignment.

A party defendant cannot reform a contract where the alleged mistake was caused by his negligence.

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Statement.

"J. A. Peters, witness for the defendant, testified that in October, 1911, he was working for the J. P. Peters Commission Company. That he took charge of the cattle on behalf of the City National Bank and signed the livestock contract under which the cattle moved, as agent for the City National Bank (S. F. 28); that he ordered the cattle to be billed to the First National Bank of Kansas City, care of J. P. Peters Commission Company and that was the billing that he gave the clerk for the Railroad Company that issued the bill of lading at the joint warehouse; that he gave the agent directions at the same time the contract was executed; that when he executed the contract he directed the agent how to bill; that he directed the agent to bill care of the J. P. Peters Commission Company. (S. F. 29.)

E. W. Jarvis, witness for the defendant, testified that he prepared for the carriers the bills of lading and waybills in controversy; that J. A. Peters issued billing instructions on the cattle; that Peters's instructions were that the cattle be billed from the City National Bank to the first National Bank of Kansas City, Missouri, care of the J. P. Peters Commission Company.

(See that part of bill of lading as to billing, under Appellant's First Assignment of Error, pages 25-26 of this brief.) (S. F. 9.)

Authorities under First Proposition.

Vol. 24, Am. & Eng. Encyl. of Law, 2nd Ed., 656.

34 Cyc., 948.

23 Ruling Case Law, 349.

Robertson vs. Smith, 11 Tex., 211.

Cole vs. Kjellberg, 141 S. W., 120.

Clark vs. Wood, 37 S. W., 188.

Wallace vs. Chicago Railway Co. (Ia.) 25 N. W., 772.

219 Appellant's Second Counter Proposition under the Foregoing Assignment.

A party cannot be relieved from a mistake and have an instrument reformed where the opposing party cannot be put in statu quo.

Statement.

See statement under First Proposition hereof.

In the course of the opinion, the court stated:

"The original agreement entered into at Austin between Smith and Chambers, contained the stipulation that the former should assign to the latter the judgment in question. The reason assigned by him for refusing to do so was that when he accepted the proposition of the latter, he was not aware that it contained that stipulation. The evidence, however, will not warrant that conclusion. But whether he knew of the stipulation or not is immaterial, if no deception was practiced upon him, and by the use of ordinary diligence he might have known. There is no evidence that he was deceived or misled by any misrepresentation or concealment of the fact. If mistaken as to the terms of the proposition, it must be ascribed solely to his own carelessness or intention; and for the consequences of these, the party is himself alone responsible. They afford him no ground of relief against the stipulations of his contract."

In the case of *Cole vs. Kjellberg*, 141, S. W., 120, was a suit instituted by appellant to correct a certain deed made by him to appellee, through a misrepresentation of the property conveyed; that appellant instructed the surveyor to number the lots from west to east but he numbered them from east to west. The court held, speaking through Justice Fly:

220 "Under the facts, as presented, if there was a mistake in the deed, it was one made by appellant alone, there being no mutuality in the mistake. Appellant had the map made and he placed it on record and sold the land to appellee as described on that map. The mistake was the result of his carelessness and equity will not relieve him from such mistake. The means of detecting the mistake were in the hands of appellant long before the appellee bought the land. Relief in equity cannot be granted upon the ground of mistake alone and this applies with greater force where the mistake is the result of carelessness of the party seeking the relief."

See also the case of *Clark vs. Wood*, 37 S. W., 188, in which appellant mortgaged a house to appellees' assignor but the mortgage contained no power of sale. Appellees sought to supply this want of power in the mortgage by showing that it had been omitted through

fraud or ignorance of appellant who had drawn the instrument. On this issue of mistake, the court said:

"It is well established rule in equity that where a written instrument fails to express the real contract, it may be reformed upon oral proof, provided such failure is due to fraud, accident or mistake, but it is as equally well established that where it is due to negligence or inattention of the complaining party, equity affords no relief."

Applying these principles to the case in question, where the undisputed facts show that the omission or mistake to include in the bill of lading "Care of J. P. Peters Commission Company" was due to the acts and conduct of the receiving carrier's agent, they, the defendants and the complaining parties are not entitled to have the contract reformed. It will not be contended that the acts or conduct of Peters in any manner influenced or caused the omission or the negligence of the billing clerk. On the contrary, its omission was entirely
221 due and brought about by the billing clerk independent of the acts and conduct of J. P. Peters, and notwithstanding the instrument of the said Peters to the billing clerk to the contrary. It will follow, therefore, in view of the evidence in this case, as a matter of law and on principles of equity that the defendants were not entitled to have the contract reformed.

There is another principle equally as sound as that just presented which will deprive the defendants of their alleged plea for reformation. Before an instrument can be reformed it must be made to appear that the parties, or at least the opposing party, can be placed in statu quo. Reviewing briefly the facts in this case; J. A. Peters, a special agent of plaintiff bank authorized to make shipment of the cattle in question and receive from the carrier a bill of lading, without authority or knowledge of the plaintiff bank, instructed the billing clerk, who prepared the bill of lading, to consign the cattle to the First National Bank of Kansas City, care of J. P. Peters Commission Company. The billing clerk did not insert in the bill of lading the provision for "Care of J. P. Peters Commission Company" but filled out, executed and delivered to the City National Bank a bill of lading consigning the cattle to the First National Bank of Kansas City—no reference or recitation therein contained having mentioned, "Care of J. P. Peters Commission Company." It was contended in the trial court and the proposition no doubt will be presented on appeal by the appellees, that they were instructed by Peters to deliver the cattle care of J. P. Peters Commission Company, and relying
222 upon said instructions, and in accordance therewith, made that kind of a delivery. It was undisputed, however, that

Peters had no authority to give such instructions, to the billing clerk nor did the City National Bank have any knowledge of said instructions, or of any billing contrary to or at variance with the terms of the bill of lading delivered to it. The cattle were in due time, and after receipt of the bill of lading by the plaintiff bank, transported to Kansas City, where a delivery was made to the Peters Commission Company, without the knowledge or consent of the

plaintiff bank, who, in the meantime, had forwarded its bill of lading, with draft for purchase price of the cattle, drawn on the J. P. Peters Commission Company, to the Kansas City First National Bank to be delivered to said Peters Commission Company upon payment of the draft. These facts transpired, and the entire transaction, which is the subject matter of the reformation, was concluded within the course of a few days. The plea of reformation was filed and insisted upon and acted upon in the lower court several years thereafter. It would seem that the position of the defendants is clearly defeated by the principle requiring a complaining party to a plea for reformation, to show that the parties could be put in statu quo.

This principle is laid down in Vol. 24, Am. & Eng. Encyclo of Law, 2nd Ed., page 657 in the following terms:

"The right to reform a contract supposes that the situation has remained substantially unchanged. If on the contrary, the parties cannot be put in statu quo, substantially, equity will generally refuse relief."

To same effect in the case of Grymes vs. Sanders, 23 U. S. Supreme Court Reports, page 802:

223 "The court of equity is always reluctant to re-cind unless the parties can be put back statu quo. If this cannot be done, it will give such relief only where the clearest and strongest equity imperatively demands it."

This position was clearly taken by the Texas Supreme Court in the case of Kesler vs. Zimmersmitte, 1 Tex., page 55, as follows:

"A mistake is, doubtless, often the ground of relief. But then it is then under this qualification that if the party was not drawn into the commission of such mistake by the agency of the defendant, he cannot be relieved without placing the defendant in the same situation he was in before the transaction took place. This is a principle of equity that will not need the weight of authority to sustain it."

The position of the parties to this case was so far changed that the cattle have been entirely lost to the plaintiff since the transaction involving the alleged mutual mistake. The plaintiff at no time knew of any mistake or shipping instructions or a contract different from that received by it from the carrier. After the mistake had been committed, the cattle transported and delivery made, contrary to the contract as written, and the cattle were wholly lost to plaintiff, the City National Bank cannot now be placed in the same situation as it was before the transaction took place. The statu quo has been destroyed. The subject matter of the contract sought to be reformed, is now and has been since the year 1911 beyond the control of either of the parties to this suit. We, therefore, confidently insist that the defendants were not entitled to a reformation of the bill of lading, both because a mistake was brought about by the negligence of their

agents and because the parties could not be placed in statu
 224 quo. If we are correct in this position, the plea of the de-
 fendant seeking reformation offered no defense, and the find-
 ings of the jury on that point in favor of the defendants and here-
 inafter quoted as being unsupported by the testimony, are immat-
 erial. The case should be decided as on the bill of lading originally
 issued and delivered by the receiving carrier.

Appellant's Fourth Assignment of Error.

(Paragraph 23 Motion for New Trial.)

The court erred because there was no evidence showing or tending
 to show that J. A. Peters was authorized by plaintiff to ship or bill
 the — in care of the J. P. Peters Commission Company, and the
 burden being on defendants to show such authority, and having
 failed to make such proof, this plaintiff is not bound by such in-
 structions of said J. A. Peters to the carrier's agent, and plaintiff and
 defendant are therefore, bound by said contract and under the terms
 thereof plaintiff is entitled to judgment.

Proposition under the Foregoing Assignment.

The burden of the proof was upon the defendant, seeking to re-
 form the contract in question to show that J. A. Peters, the agent of
 plaintiff, was authorized by plaintiff to bill the cattle in care of the
 J. P. Peters Commission Company, and in the absence of such proof
 plaintiff is not bound thereby.

225

Statement.

See statement under appellant's Third Assignment of Error, pages
 85 to 86 this brief.

Said J. A. Peters testified:

"I signed all the contracts and looked after that and all the ship-
 ments we had. I signed the live stock contract under which the
 cattle moved out of here, as agent of the City National Bank, I
 signed it City National bank by J. A. Peters. (S. F. 28.) * * *
 I do not remember that the City National Bank ever instructed me
 to bill these cattle in care of the Peters Commission Company. They
 never did that I remember of. I had no authority to sell the cattle
 without handling them for the City National Bank * * *. I
 do not remember that the City National Bank authorized me to bill
 these cattle care of the Peters Commission Company instead of the
 First National Bank of Kansas City. I do not remember of ever
 talking to them about it, or telling them that I had done it. I
 would not want to swear either way * * *. My interest in the
 cattle was merely an equity and the City National Bank had title
 and possession and claimed the cattle until their money was repaid
 to them, and it was the understanding that I had no right to re-

lease those cattle from the possession and ownership of the City National Bank by anything I did until they were first paid for." (S. F. p. 31.)

J. F. Williams, vice-president of plaintiff bank testified; "J. A. Peters looked after the shipping of the cattle, tallying and loading the cattle for us. We had no arrangements with Mr. Peters; he was working with Mr. Cameron. Mr. Cameron was the man supposed to be looking after the cattle (S. F. p. 20.) I testified that I had charge of these shipments of cattle for the City National Bank. I never at any time instructed J. A. Peters to execute or instruct the railway company to execute for the City National Bank way bill consigning the cattle or any of the shipments of cattle to the First National Bank care J. P. Peters Company. I did not know at the time those way bills were issued, or at any time prior to the
226 shipment involved was shipped, that those way bills had any shipping directions to J. P. Peters Commission Company, or that any of the bills of lading that were presented to me by J. A. Peters covering this or previous shipments, had that clause in them. I don't recollect seeing any with that clause in it. I would not have accepted any with that clause in it. We shipped the cattle with bill of lading directed to the First National Bank, draft attached, because we had advanced money on these cattle, we thought we could consign them to a reliable institution representing us, and we thought they would collect the money, and we would get our money back." (S. F. p. 40.)

Authorities.

Volume 23, Ruling Case Law, Subject "Reformation of Instruments," Article 20, page 328.

Floars vs. Aetna Life Insurance Company (N. C.), 56 S. E. 915.

Barker vs. Pullman Palace Car Company, 124 Fed., 555.

Argument under the Foregoing Assignment.

The defendants pleaded mutuality of mistake in the drafting of the bill of lading by the way bill clerk of the carrier, and the City National Bank, acting through its agent, J. A. Peters. This plea was an affirmative one and as an essential part of this plea it was necessary for the defendants to plead and prove that J. A. Peters was authorized by the plaintiff bank to make the contract so that the same should include therein "Care of J. P. Peters Commission Company." It will be recalled that the contract as actually executed and delivered to plaintiff did not provide "Care of J. P. Peters
Commission Company." In order to change and reform this

227 contract and make it read care of J. P. Peters Commission Company, in the beginning, it would have been necessary for the said J. A. Peters as agent of the plaintiff bank, to have had authority therefor. If the said J. A. Peters did not have authority from his principal, the plaintiff bank, to make the contract with the

carriers which should provide "in care of the J. P. Peters Commission Company," the principal would not be bound by any instructions of the said Peters in regard thereto, nor would the finding of the jury of the mutual mistake be material.

Under the subject of "Reformation of Instruments" in Volume 23 Ruling Case Law, sub-division of "Mutuality of Mistakes," Section 20, page 328, it is stated:

"A mutual mistake is one which is reciprocal and common to both parties, where each alike labors under the same misconception in respect to the terms of the written instrument, and sometimes of the agreement itself. A mutual mistake of their agents is not necessary a mistake of the parties. Undoubtedly it would be in case where the mistake was made by a scrivener who acted as common agent of both parties in drafting the instrument; if one party is represented by an agent, it is necessary to show that he had authority to make the stipulations of the agreement which are alleged to have been omitted."

To the same effect is the holding of the North Carolina Supreme Court in the case of Floars vs. Aetna Life Insurance Company, 56 S. E. 915, the suit being to reform the terms of the insurance policy written by the agent of the insured.

228 "There is no evidence here of any mistake on the part of the company, and none tending to show that it did not issue the very policy it intended. Again, in order to reform a policy by reason of an alleged mutual mistake of the applicant and agent, it should be shown that the contract as claimed, * * * But, where an agreement made with the agent is not one which he had authority to make, and its terms are not communicated to or adopted by the principal, and is not a binding contract upon the parties, there can be no reformation."

The record fails to show that J. A. Peters, who executed the bill of lading for the plaintiff bank, had authority to make a contract with the carrier consigning the cattle in care of the J. P. Peters Commission Company. On the contrary, J. F. Williams, who had charge of the shipments for the plaintiff bank, and who gave to J. A. Peters what authority he possessed, stated:

"I never at any time instructed J. A. Peters to execute or instruct the railway company to execute for the City National Bank way bill consigning the cattle or any of the shipments of cattle to the First National Bank care J. P. Peters Commission Company * * *. I would not have accepted any with that clause in it." (S. F. p. 40.)

Said Peters also admitted that he had no such authority from the City National Bank. Messrs. Williams and Peters were the only witnesses who testified regarding the authority of J. A. Peters, and the evidence on the subject having clearly shown the absence of authority of the said Peters to bind the plaintiff bank in consigning

the cattle in care of the J. P. Peters Commission Company, the evidence of a mutual mistake and any finding of the jury thereon was immaterial and not binding upon the plaintiff. Any later findings of the jury on the above questions are attached for insufficient evidence; but if the above position is correct such findings are immaterial. This should follow because there was no authority in J. A. Peters to bill the cattle in care of the J. P. Peters Commission Company, and the defendants' plea for reformation of the bill of lading was without effect and the rights of the parties are determined, therefore, by the contract as written, delivered and accepted.

Appellant's Fifth Assignment of Error.

(Paragraph 2, Motion for a New Trial.)

"The court erred in refusing to give plaintiff's special instruction No. 3 as follows: 'Do you find from the evidence by a preponderance thereof that the plaintiff, City National Bank, on receipt of the bill of lading in question in this suit, relied on same as expressing the true contract between the parties, and were without notice that the way bill directed that the cattle be delivered to the First National Bank care of J. P. Peters Commission Company? Answer Yes or No.'"

Proposition under Foregoing Assignment.

If the carrier issues and delivers a bill of lading to the consignor, who relies upon the same as expressing the true contract between the parties, the carrier is bound by the terms of said bill of lading.

Statement.

See plaintiff's bill of exception No. Two, page 50 Tr. where it is shown that the court refused to grant plaintiff's Special Question Number Three, as follows:

"Do you find from the evidence by a preponderance thereof, that the plaintiff, the City National Bank, on receipt of the bill of lading in question in this suit, relied on same as expressing the true contract between the parties and were without notice that the way bill directed that the cattle be delivered to the First National Bank, care of the J. P. Peters Commission Company. Answer Yes or No."

Also see statement under Appellant's First Assignment of Error.

Argument.

It was contended by the appellees in the lower court, and no doubt will be their position on appeal, that the delivery was made with the directions contained in the way bills. In view of the fact that the

bill of lading was issued and delivered by the carrier's agent to J. P. Peters, a special agent of the City National Bank, it was pertinent to the issues raised by the defendants' pleadings and their position in regard to the weight to be given to the way bills, that a finding be made by the jury on the issues called for in plaintiff's said special Question Number Three, that is, whether the plaintiff on the receipt of the bill of lading relied upon the same as expressing the true contract between the parties, and was without notice that the way bill directed that the cattle be delivered to the First National Bank care of J. P. Peters Commission Company. If the railroad executed, issued and put into circulation a bill of lading purporting to be the contract between the shipper and the carrier, and subsequent to the execution and delivery of said bill of lading the carrier issued a way bill at variance with the bill of lading, as regards the delivery of the cattle, on a finding by the jury to the effect that the plaintiff on receipt of the bill of lading relied on same as expressing the true contract between the parties, and was without notice that
231 the way bill was at variance with the bill of lading, the carrier would be estopped to set up a defense predicated upon a delivery made in pursuance of, or according to, the terms of its way bill.

Appellant's Sixth Assignment of Error.

(Paragraph 14, Motion for a New Trial.)

The court erred in hearing the evidence about the way bills and the introduction of the same by the defendants over the objection of the plaintiff, for the reason as then and there stated by the bill of lading introduced in evidence constituted the contract between the parties and controlled their rights, and the way bills being executed solely by the carrier without the shipper joining therein for the guidance only of the carrier, were not binding on the shipper and could not control or in any way affect the bill of lading, which objection, as aforesaid, was overruled by the court.

Proposition.

The foregoing assignment is submitted as a proposition.

Statement.

See plaintiff's bill of exception No. Five, Tr. 53, as follows:

While the witness for the defendants, J. P. Peters, was testifying, the following proceedings were had, to-wit: The counsel for the defendants hands to the witness the livestock bills for the purpose of introducing the same in evidence, and after hearing evidence about the way bills, to which evidence and the introduction
232 of said way bills in evidence, the plaintiff through its attorneys objected, for the reason that the bill of lading intro-

duced in evidence constituted a contract between the parties and controlled their rights, and the way bills executed solely by the carrier without the shipper joining therein and being for the guidance only of the carrier, were not binding on the shipper and could not control or in any way affect the bill of lading.

See the evidence of J. C. Wallwork, witness for the defendants, page 39, S. F., as follows:

"A bill of lading precedes the way bill. After the execution of the bill of lading then comes the way bill. Way bills are for carrying freight, for the enlightenment of the conductor, for the conductor to know what he has on his train. In other words, we make up a train load of cattle and execute the bills of lading and then we issue our way bills, and deliver those to the conductor; when he gets to a terminal he passes those along until they reach their destination. That is the purpose and object of way bills. The shipper does not sign the way bills; he has nothing to do with them. They are for the use of the railroad company. Nobody has possession of the way bills except the conductor of the railroad. The shipper or agent accompanying the shipment does not have the way bills, and no duplicate is issued. There is only one original and that is carried by the conductor until they reach their destination. The caretaker has no connection with the way bills, or should not have; I suppose in the caboose they probably look at them sometimes. Way bills should be made out in conformity with the bills of lading or shipping contracts, unless sometimes the contracts are made and then they come around and ask you to add something on there and in your hurry the billing clerk is liable to forget to put it on the other * * *."

See also bill of lading, beginning with page 7 of Statement of Facts, and also set forth substantially in Statement under Appellant's First Assignment of Error.

233

Authorities.

Vol. 4, Ruling Case Law, subject Bills of Lading, Articles 19-24, inclusive.

Argument.

Plaintiff instituted a suit on the contract executed by the receiving carrier with it, in the form of a bill of lading, which contract was clearly unambiguous and defined the rights and liabilities of each of the contracting parties. It is well settled the bill of lading occupies a dual position, namely that of a receipt and a contract. The evidence in this case discloses also that the way bill does not partake of the nature of the contract, but is an ex parte, written instrument, put out by the carrier to assist the latter in making delivery in accordance with its contract or bill of lading. With the issuance or preparation of the way bill the shipper has nothing to do. It is not a part of the contract or supplementary thereto, and

in no way influence or should control the terms and conditions of the contract of affreightment. When, therefore, the court admitted in evidence the numerous and various way bills governing this and previous shipments, it committed error and allowed to go before the jury evidence highly damageable to the plaintiff. It was hurtful in that the bill of lading did not mention the name of the Peters Commission Company, but all of the way bills recited that the consignee was the First National Bank care of the Peters Commission Company. The ordinary layment might reasonably conclude that a carrier is justified in making deliveries on their way bills. When the lower court permitted the introduction of the way bills and when the evidence disclosed that the delivery was made to the Peters Commission Company, such facts were highly prejudicial to the rights of the plaintiff and, no doubt, influenced the jury in answering the questions propounded to them by the court. The rule is given in Vol. 4, Ruling Case Law, subject Bill of Lading, Article 22, as follows:

"The rule denying the admissibility of parol evidence to vary written contracts is applicable to the contractual stipulation in a bill of lading; for in the transportation of freight a bill of lading embodies the contract between a shipper and a carrier, and when delivered by a carrier and received by a shipper, its terms, stipulations, and conditions are as binding on the parties thereto as are the terms, stipulations and conditions of any other written contract. A bill of lading is, therefore, to be taken as the sole evidence of the final agreement of the parties, by which their duties and liabilities must be regulated and in which all prior and contemporaneous agreements are merged, and parol evidence is admissible to vary its terms or legal import."

Appellant's Seventh Assignment of Error.

(Paragraph 15, Motion for a New Trial.)

"The court erred in permitting the defendant, over the objections of the plaintiff, to allow the witness, J. A. Peters, to testify how he directed the agent of the carrier to way bill the cattle, for the reason that the bill of lading controlled and not the way bill, and because if there was a mutuality of mistake it was not shown that the plaintiff had knowledge of the mutuality of the mistake."

Proposition under the Foregoing Assignment.

The fact that J. A. Peters directed the agent of the carrier to way bill the cattle at variance with the bill of lading is immaterial, because the bill of lading controlled and not the way bill.

235 See plaintiff's bill of exception No. 6, p. 54, Tr. as follows:

"While the defendant's witness J. P. Peters was testifying for the defendants, said witness, over the objections of the plaintiff,

testified how he directed the agent of the defendant carrier at El Paso to way bill the cattle in question, plaintiff objecting to said testimony for the reason then given by counsel for the plaintiff, that the bill of lading controlled and not the way bill, and because if there was a mutuality of mistake it was not shown that the plaintiff had knowledge of the mutuality of the mistake."

Argument.

What we have stated in the next preceding assignment relative to the admissibility of the way bills is applicable to this assignment of error. Any directions given by the witness, Peters, to the defendant carrier about way billing the cattle at variance with or in conflict to the bill of lading, is clearly inadmissible as varying and contradicting an unambiguous contract. Such testimony was, further, inadmissible because there was no evidence showing or tending to show that the plaintiff had any knowledge of said alleged directions from the witness, Peters, to the railroad's agent about way billing the cattle, or any knowledge of said purported mistake of the carrier's agent in not including in the bill of lading instructions of J. A. Peters. Where a carrier has prepared, and put into circulation and delivered to a special agent of the consignor a bill of lading to be delivered to the consignor, and which bill of lading purported to contain the contract between the consignor and the carrier, the carrier should not be permitted to prove that the bill of lading did not express the true contract of the parties and show by evidence that the bill of lading should have read: "Care of J. P. Peters Commission Company."

Had the City National Bank knowledge of said alleged mistake or error in the execution and issuance of the bill of lading no complaint could arise, but where it was wholly without such knowledge and received and accepted said bill of lading and relied on the terms therein contained, it is inequitable for the railroad to escape liability, because of an alleged mutual mistake committed by its agent, who prepared the bill of lading and omitted therefrom "care of J. P. Peters Commission Company."

Appellant's Eighth Assignment of Error.

(Paragraph 16, Motion for a New Trial.)

"The court erred in permitting the defendants' witness to testify over the objections of plaintiff as to other and different shipments and the manner in which such other and different shipments were handled, and the method said other shipments were handled; for the reason as thereupon urged by plaintiff's counsel that it was immaterial to the issues in this case how any other shipments were handled and because custom could not vary the terms of the specific written contract."

Proposition under Foregoing Assignment.

The manner in which other and different shipments were handled by the carrier is immaterial where a plaintiff is suing on the bill of lading executed by the carrier and asked judgment of the failure to deliver in accordance with the bill of lading.

237

Statement.

John F. Waite, witness for the defendants, testified:

"Previous to the time of this shipment there had been other shipments from the City National Bank of El Paso to Kansas City. A representative of the bank had been in our office the day before these cattle arrived. He was a collector. He had been there at other previous times with reference to drafts on shipments * * *. I was general manager of the Peters Commission Company and in charge. The previous shipments were delivered to the yard man of the J. P. Peters Commission Company." (S. F. 25-26.)

See Plaintiff's Bill of Exception No. 7, Tr. 55.

"John F. Waite, witness for the defendants testified as to other and different shipments and the manner in which such other and different shipments were handled, and the method such other shipments were handled, plaintiff then and there objected to such testimony for the reason, as then stated, that it was immaterial to the issues in this cause how many other shipments were handled and because custom could not vary the terms of the specific written contract."

Appellant's Ninth Assignment of Error.

(Paragraph 18, Motion for New Trial.)

"The court erred in permitting the defendants to prove, by their witness John F. Waite, that there was and had been with reference to how these cattle were handled after they reached Kansas City, and whether or not they were handled on the way bill or otherwise, for the reason as then urged by counsel for plaintiff, such custom was immaterial and could not control the specific contract entered into between the parties, and for the reason that it was not shown that plaintiff, and who was the shipper, had any knowledge of such custom."

Proposition under Foregoing Assignment.

The positive and unambiguous terms of a written contract cannot be controlled by a custom at variance therewith.

John F. Waite, witness for the defendants, testified:

"At that time and at the present time Kansas City is a large cattle market, and they have big stockyards there where incoming cattle are taken and sold to purchasers. There is a general custom with reference to how these cattle are handled after they reach Kansas City, as to whether they are handled on the way bill or otherwise. Business men, bankers, and others dealing in cattle, know of the custom and manner of handling cattle after they reach Kansas City * * *. (S. F. 26) I am familiar with the way shipments of livestock at the Kansas City stockyards at that time were handled with reference to whether they were handled on the way bill or on the livestock contract; they were handled on the stubs from the original way bills * * *." (S. F. 27.)

John Fox, a witness for the defendants, also testified:

"I am familiar with the general custom of handling of cattle on that market as to their delivery and as to whether they were delivered on the way bill or on the livestock contract. I was familiar with that custom at that time. It was the custom to deliver cattle at that stockyard on the way bill or way bill stubs; the contracts were not used * * *. That custom was not limited in any manner, generally known to be the custom."

On cross-examination the witness testified:

"I could not say that this custom was known to the First National Bank of Kansas City." (S. F. 32).

"E. F. Reese, a witness for the defendants, stated that he was a livestock agent at the Kansas City stockyards for the Chicago, Rock Island & Pacific Railroad in October, 1911, and knew of the shipment in question which was handled in delivering on original way bill, and the previous shipments were handled in the same manner; there may have been a few handled with the stub bill, but all of them were either handled with the original way bill or the stub of the way bill. The live stock contract is retained by the shipper for transportation purposes, and that custom was generally known. I cannot say whether that custom was known by the First National Bank. I do not know whether that custom was known to the City National Bank of El Paso or the First National Bank of Kansas City * * *. My only information as to what the City National Bank had done at any time was from the billing instructions. My information was gained by way bills." (S. F. 34.)

Authorities.

Vol. 4, Ruling Case Law, subject Bill of Lading, Art. 27.

Elliott on Railroads, Vol. 4, Sec. Edition, Section —.

Vol. 10 Corpus Juris, Art. 364.

Bernard vs. Dunham, 19 L. E. p. 900.

N. Pa. R. R. Co. vs. Commercial National Bank, 31 L. E. 291.

Bank of Commerce vs. Bissell, 72 N. Y. 615.

Pa. R. R. Co. vs. Stern (Pa.), 4 A. S. R. 627.

Weyland vs. A. T. & S. F. Ry. Co. (Iowa), 9 A. S. R. 504.

Appellant's Tenth Assignment of Error.

(Paragraph 6, Motion for a New Trial.)

"The answer of the jury of 'Yes' to Question No. 1 propounded by the court is contrary to the manifest weight of the testimony and unsupported by the evidence introduced in said cause, for the reason that all the evidence shows that contemporaneous with or just prior to the execution and delivery of the bill of lading covering the shipment of cattle it was not mutually agreed between J. A. Peters, acting for plaintiff, and the agent of the receiving carrier, that such cattle should be consigned by bill of lading to the First National Bank at Kansas City, Missouri, care of the J. P. Peters Commission Company."

Proposition under Foregoing Assignment.

240 Where the jury answers a question material to the issue in the case, and the answer is contrary to the manifest weight of the testimony and unsupported by the evidence, its verdict should not stand.

"Question Number One. Do you find from the evidence, by a preponderance thereof, that contemporaneous with or just prior to the execution and delivery of the bill of lading covering the shipment of cattle in question in this suit, it was mutually agreed by and between J. A. Peters, acting for City National Bank, and the agent of the receiving carrier at El Paso, Texas, that such cattle should be consigned by the bill of lading to the First National Bank of Kansas City, Missouri, care of the J. P. Peters Commission Company?"

"Answer: Yes." (Tr. 28.)

"J. A. Peters, a witness for defendant, testified that in October, 1911, he was working for J. P. Peters Commission Company, Kansas City, Missouri, and was the son of J. P. Peters, the sole owner of that business, and was connected with the shipment of the cattle in question * * *. I took charge of them on behalf of the

City National Bank when they reached here * * *. I signed the livestock contract under which the cattle moved out of here as agent of the City National Bank * * *. (S. F. 28.) These are the way bills issued by the El Paso & Southwestern System, Dated October 27, 1911, under which the cattle in question moved. It appears in those way bills that the cattle were consigned by the City National Bank to the First National Bank of Kansas City, care of J. P. Peters Commission Company. I billed them that way * * * that is the billing I gave the clerk of the railroad that issued the bill of lading at the joint warehouse. I think I gave the agent the directions, with reference to the shipment, at the same time the contract was executed. My recollection is so, undoubtedly so. When I executed the contract I directed the agent how to bill. I directed him to bill care of the J. P. Peters Commission Company. I don't remember exactly, but I should judge that was about the eighteenth or twentieth train of cattle that we had handled from Mexico consigned by the City National Bank to the First
241 National Bank of Kansas City about that time. Practically all of those shipments were handled under the same agreement between Mr. Cameron and the City National Bank and myself. (S. F. 29.) The first shipments of the eighteen or twenty were not consigned to the First National Bank care J. P. Peters Commission Company like this shipment was; I do not remember just how many were, but several shipments previous to this one were consigned to same way as this shipment." (S. F. 30.)

On cross-examination the witness continued:

"I do not remember that the City National Bank ever instructed me to bill these cattle in care of the Peters Commission Company. They never did that I remember of. I had no authority to sell the cattle without handling them for the City National Bank. We sold numerous shipments here * * *. I do not remember that the City National Bank authorized me to bill these cattle care of the Peters Commission Company instead of to the First National Bank of Kansas City. I do not remember of ever talking to them about it, or telling them that I had done it. I would not want to swear either way * * *." (S. F. 31.)

"E. W. Jarvis, a witness for the defendants, testified that in October, 1911, he was working for the joint warehouse in El Paso, and had prepared the bills of lading and way bills in controversy. Witness identified the livestock contract of the El Paso & Southwestern System with the City National Bank, as consignor, and the First National Bank of Kansas City, as consignee. He stated: 'The pink paper is a duplicate or carbon of the original. The white paper is the original.' The witness then identified twenty-eight sheets known as way bills covering shipments of cattle from El Paso, Texas, to Kansas City, Missouri, consigned to the First National Bank of Kansas City, care of J. P. Peters Commission Company, dated October 27, 1911. Said witness stated that J. A. Peters issued the billing instructions on these cattle. 'His instructions were the cattle were billed from the

City National Bank to the First National Bank of Kansas City, Missouri, care J. P. Peters Commission Company * * *."

242 Appellant's Eleventh Assignment of Error.

(Paragraph 7, Motion for a New Trial.)

"The answer of the jury of 'Yes' to Question No. 2 propounded by the court is contrary to the manifest weight of the testimony and unsupported by the evidence introduced in said cause, for the reason that all the evidence shows that when the bill of lading was issued that the same did not by mutual mistake of J. A. Peters and the agent of the defendant carrier omit to state in the bill of lading in accordance with their mutual agreement, that the cattle were consigned to the First National Bank care of the J. P. Peters Commission Company."

Proposition under Foregoing Assignment.

Where the jury answers a question material to the issues in the case, and the answer is contrary to the manifest weight of the testimony and unsupported by the evidence, its verdict should not stand.

Statement.

See statement under the next preceding assignment of error, also see Question 2 and the jury's answer thereon, Tr. 29, as follows:

"Question No. 2. Do you find from the evidence, by a preponderance thereof, that when the bill of lading covering the shipment of cattle in question was issued that the same, by the mutual mistake of J. A. Peters, acting on behalf of the City National Bank, and the said agent of the defendant carrier acting in their behalf, omitted to state in the bill of lading in accordance with their mutual agreement, that the cattle were consigned to the First National Bank care of the J. P. Peters Commission Company, if such agreement there was?"

"Answer. Yes."

243 Authorities.

34 Cyc., 984 to 990, inc.

Vol. 23, Ruling Case Law, Art. 65, page 365, also Art. 66 and 67 and 68, pages 367 to 369, inc.

Waco Tr. Co. vs. Shirley Co., 45 Tex., 357.

U. S. Maxwell Land Grant Co., 30 L. E. 949.

Stevens vs. Stevens, (Mo.), 183 S. W. 572.

Appellant's Twelfth Assignment of Error.

(Paragraph 9, Motion for a New Trial.)

"The answer 'Yes' of the jury to Question No. 5 propounded by the Court is contrary to the manifest weight of the testimony and unsup-

ported by the evidence introduced in said cause, for the reason that there was no evidence showing or tending to show that the First National Bank had notice prior to the arrival of the shipment in question that the delivering carrier had delivered prior shipments, or some of them, to the Peters Commission Company prior to the payment of the drafts drawn on said Peters Commission Company for such prior shipments; or that said bank ratified or acquiesced therein.

Proposition under Foregoing Assignment.

Where the jury answers a question material to the issues in the case, and the answer is contrary to the manifest weight of the testimony, and unsupported by the evidence, its verdict should not stand.

Statement.

John F. Waite, a witness for the defendants, and who was the office manager for the J. P. Peters Commission Company at Kansas City, in October, 1911, testified that prior to the time of this shipment there had been other shipments from the City National Bank of El Paso, (S. F. 24) to Kansas City. "A representative of the bank had been in our office the day these cattle arrived. He was a collector. He had been there at other previous times with reference to drafts on shipments * * *. He was there the day before this shipment came in, he did not ask anything about these cattle, I told him the cattle were not in yet. He was there the next day, the cattle were then in the pens, and I told him the cattle were not sold. They were in the pens of the J. P. Peters Commission Company. I did not tell him they were in the pens of the J. P. Peters Commission Company. Nothing was said by him with reference to that matter. I suppose the cattle were sold in the course of a half hour after he left * * *. The previous shipments were delivered to the yard man of the J. P. Peters Commission Company. The collector of the First National Bank did not know of the delivery of the previous shipments, nor did the bank. Nothing was done by the bank with reference to the previous shipments with reference to whether they were paid any sum of money arising from their sales. The Commission Company paid the drafts at the bank drawn against them on previous shipments, commencing October 4th; the bank in El Paso would send the draft to the First National Bank of Kansas City for collection, they would send it down to the office of J. P. Peters Commission Company, and we would issue them a check to take up the draft. The drafts were always drawn against the J. P. Peters Commission Company and on the previous shipments sold the drafts had been paid to the bank. In this particular instance the draft was not paid * * *. On all the previous shipments before the cattle were sold and delivered, after reaching the Peters Commission company, they had taken up and paid a draft drawn against the Commission Company through the First National Bank of Kansas City. In some cases the draft did not get there before the cattle; in those cases the draft was held until the cattle were entered and

sold. In those instances in which the draft reached there before there was a sale, the draft had not been taken up and paid before the cattle were delivered to the purchaser. I have not stated that they
 245 would come down with the draft and before the cattle were sold and delivered that the company would give a check (S. F. 26) for the amount that was represented by the draft drawn by the City National Bank on the First National Bank. If the cattle came first and were sold, when the draft was presented we paid it, if the draft came before the cattle were in the yards, they would hold the draft until the cattle were sold * * *." (S. F. 27.)

See also Question No. 5 and the jury's answer thereto, Tr. 29, as follows:

"Question No. 5. Do you find from the evidence, by a preponderance thereof, that in cases of prior shipments of cattle inquired about in Question Number Four, that the said First National Bank had notice prior to the arrival of the shipment in question herein, that the delivering carrier had delivered such prior shipments on some of the same to the Peters Commission Company prior to the payment of the drafts drawn on the Peters Commission Company for such prior shipment, if any of them had been delivered prior to the payment of the drafts, and said bank ratified and acquiesced therein?"

"Answer. Yes."

Appellant's Thirteenth Assignment of Error.

(Paragraph 10, Motion for a New Trial.)

"The answer of the jury 'Yes' to Question No. 6 propounded by the court is contrary to the manifest weight of the testimony and unsupported by the evidence introduced in said cause, for the reason that there was no evidence showing or tending to show that the delivering carrier delivered the cattle in question to the J. P. Peters Commission Company in reliance upon the ratification or acquiescence of the First National Bank of Kansas City in the delivery of said prior shipments of cattle to the J. P. Peters Commission Company before payment of drafts attached to bill of lading."

Proposition under Foregoing Assignment.

Where the jury answers a question material to the issues in the case, and the answer is contrary to the manifest weight of the
 246 testimony and unsupported by the evidence, its verdict should not stand.

Statement.

See statement under appellant's tenth assignment of error.

John H. Waite, a witness for the defendants, testified that it was the general — in Kansas City to handle and deliver the cattle on the

way bills. (S. F. 26.) Also that these cattle were handled at Kansas City stock yards on the stubs of the way bills (S. F. 27).

John Fox, livestock agent of the defendant railroad in Kansas City, during the time involved, stated that it was the custom to deliver cattle at the stock yards in Kansas City on the way bill or way bill stubs, and that the contracts were not used; that none of the carriers knew anything about the contracts; that the receiving carriers rarely, if ever, knew anything about the contract until surrendered to them, or offered to be surrendered to the receiving agent for the purpose of obtaining return transportation for the caretakers. (S. F. 32.) On cross-examination the same witness continued:

"I could not say that this custom was known to the First National Bank of Kansas City. When the railroad company delivers to the stockyards, the railroad company looks to the stockyards company to reimburse them for any freight charges and any other charges that may be against the cattle. The railroad company does that without regard to who they are consigned to; they delivered them to the stockyards company (S. F. 32) and take them out without regard to who they are consigned to. When a shipment of cattle comes to

247 Kansas City the railroad turns them over to this stockyard company without regard to whom they may be consigned. It is my understanding that the stockyards company is bound to the railroad company to see to proper delivery. The shipments of livestock are delivered to Kansas City stockyards company of Missouri under way bills or stubs * * *. The shipment of October 27th was handled in delivering on original way bill, and the previous shipments were handled in the same manner; there may have been a few handled with stub bill. All of them were either handled with the original way bill or the stub of the way bill. At that — it was the generally known custom in Kansas City to handle the live stock there that way. They were handled that way because that was the only means of delivery to the stockyards * * *. I could not say whether that custom was known by the First National Bank." (S. F. 33.)

E. F. Reese, who was the livestock agent at the Kansas City stockyards for the Chicago, Rock Island & Pacific Railroad, in October, 1911, said that the shipment of October 27th, was handled in delivering on the original way bill, and the previous shipments were handled in the same manner.

"There may have been a few handled with stub bill, but all of them were either handled with the original way bill of the stub of the way bill. The livestock contract is retained by the shipper for transportation purposes, and that custom was generally known. I cannot say whether that custom was known by the First National Bank. I do not know whether that custom was known to the City National Bank of El Paso, or the First National Bank of Kansas City. I know that the City National Bank had previous shipments that were handled under that custom. They had had previous ship-

ments which were handled on the way bills at the stockyards." (S. F. 34.)

248 See, also, Question No. 6 and the jury's answer thereto, Tr. p. 30, as follows:

"Question Number Six. Do you find from the evidence by a preponderance thereof, that in reliance upon the ratification or acquiescence of the First National Bank of Kansas City in the delivery of said prior shipments of cattle to J. P. Peters Commission Company before the payment of the drafts attached to the bills of lading, if said shipments had been delivered prior to the payment of the drafts, and the said bank did ratify or acquiesce therein, that the delivering defendant delivered the shipment of cattle in question in this suit to the J. P. Peters Commission Company without the payment of the draft attached to the bill of lading?

"Answer. Yes."

Appellant's Fourteenth Assignment of Error.

(Paragraph 11, Motion for a New Trial, Tr. 40.)

"The answer of the jury of 'Yes' to Question No. 7, propounded by the court is contrary to the manifest weight of the testimony, and unsupported by the evidence introduced in said cause, for the reason that there was no evidence showing or tending to show that the ratification or acquiescence of the First National Bank of the delivery of prior shipments before payment of drafts was reasonably sufficient to induce the belief on the part of the agent of the delivering carrier that the Peters Commission Company was duly authorized to receive said cattle for the First National Bank of Kansas City, Missouri."

Proposition under Foregoing Assignment.

Where the jury answers a question material to the issues in the case, and the answer is contrary to the manifest weight of the testimony and unsupported by the evidence, its verdict should not stand.

249

Statement.

See statement the appellant's eleventh assignment of error. See, also, Question No. 7 and the jury's answer thereto, Tr. 30, as follows:

"Question No. 7. Do you find from the evidence, by a preponderance thereof, that the acquiescence or ratification of the First National Bank of the delivery of prior shipments before payment of the drafts attached to the bill of lading, if prior shipments were so delivered and the First National Bank acquiesced and ratified same, was reasonably sufficient to induce the belief on the part of the agent of delivering defendant carrier that said J. P. Peters Commission Company was

duly authorized to receive said cattle for the First National Bank of Kansas City?

"Answer. Yes."

Argument under Foregoing Assignment of Error.

We are taking the liberty of grouping the foregoing assignments of error, inasmuch as said assignments call into question the sufficiency of the evidence to support the findings of the jury and much time and space will be saved by narrating the evidence in this manner. Notwithstanding the rule that the jury's verdict on issues of fact will not be disturbed by the Appellate Court where there is any sufficient evidence supporting the jury's verdict, yet it is equally clear that where the evidence is wholly insufficient or contrary to the manifest weight of the testimony, it is the duty of the Appellate Court to, and it should, set aside, the findings of the jury. To detail all of the evidence bearing upon the issues involved in these assignments would prolong this brief to an unnecessary length, but we have endeavored to quote from all of the evidence materially bearing upon these issues in the preceding statements. In reply to Question No. 1 (Tr. p. 28) the jury found that it was mutually agreed between J. A. Peters and the agent of the receiving carrier that the cattle should be consigned by the bill of lading to the First National Bank of Kansas City, Missouri, care of J. P. Peters Commission Company (Tr. p. 28). In answer to Question No. 2, the jury found when the bill of lading was issued that the same, by mutual mistake of said Peters and the agent of receiving carrier, omitted to state therein, in accordance with their mutual agreement, that the cattle were consigned to the First National Bank care of J. P. Peters Commission Company (Tr. p. 28). Only two witnesses testified on these issues. One was J. A. Peters, a son of the owner of the J. P. Peters Commission Company, and who was purchasing the cattle in El Paso for said Commission Company. At the time of the execution of the bill of lading, he was the special agent of the plaintiff bank to deliver the cattle to the carrier and receive from it the contract shipment. The other witness on these questions was E. W. Jarvis, the billing clerk who made out the bill of lading and way bills. While it is true that Peters testified that he directed the clerk to issue the bill of lading care of J. P. Peters Commission Company, there is nothing in the testimony either of the said Peters or the said Jarvis, the clerk, indicating that the clerk understood such instructions, or through a mutual mistake of the said Peters and the said clerk the said instructions were not carried out and said clause omitted from the bill of lading. On page 35 the said Jarvis testified that Peters issued the billing instructions on the cattle and that his instructions were that the cattle were billed from the City National Bank to the First National Bank of Kansas City, Missouri, care of J. P. Peters Commission Company. But a careful reviewing of the testimony of the said Jarvis will disclose that he was testifying as to the billing on the way bills and had no reference in such statement whatsoever to the billing on the bill of lading. The record is

silent as regards testimony by Jarvis, who executed and delivered the bills of lading, on the question of mutual mistake. No question was propounded to him showing that he made a mistake, nor did he give any evidence suggesting that he made a mistake in executing the bill of lading. Unless the said Jarvis was mistaken in executing the bill of lading, according to its particular terms, there could have been and was no mutual mistake of the said Jarvis and the said Peters. Considering also that the said Peters admitted (S. F. p. 31) that the City National Bank did not instruct him to bill the cattle in care of Peters Commission Company, or authorize him to do so, and taking also into consideration his interest in the cattle and his interest in seeing that the cattle were delivered to the Peters Commission Company without charge or without payment of the costs of the draft drawn against the same, his testimony is entitled to little, if any, weight. His testimony is also repudiated by the various bills of lading that he received from the receiving carrier and delivered to the plaintiff bank, which bills of lading did not provide for a delivery care of the J. P.

252 Peters Commission Company, but recited the First National Bank of Kansas City as consignee. Had the said Peters given the instructions to the agent of the carrier to put on the bill of lading that said cattle should be delivered to the First National Bank care of J. P. Peters Commission Company, it would hardly seem probable, and quite impossible, that the bills of lading were made out in error and such error was not detected either by Peters or the agent making out said bill.

The defendants sought to reform the written contract entered into between them and the plaintiff bank so that the contract would contain the additional clause, "Care the J. P. Peters Commission Company." The contract having been reduced to writing and executed by the parties, of itself, was entitled to considerable weight. Stronger evidence than a mere preponderance of the testimony is required to engraft upon a contract any terms or conditions not therein written. Upon this point, all the authorities agree. There is some contrariness of opinion as to the quantum of proof necessary to reform an instrument because of a mistake in its preparation or execution. Some courts go as far as to hold that the evidence must show such mistake beyond a reasonable doubt. This view might be termed an extreme one, but it is generally held that the proof must be "very clear," "clear and satisfactory," or "clear and convincing." The following rule was established by our Supreme Court in the case of Waco Tr. Co. vs. Shirley, 45 Tex., quoting from page 377, as follows:

253 "It is, however, a well established elementary principle that he who seeks to ratify an instrument on the ground of mistake, must be able to prove not only that there has been a mistake but must be able to show exactly and precisely the form to which the deed ought to be brought in order that it may be set right according to what was really intended, and must be able to establish in the clearest and most satisfactory manner that the alleged intention of the parties to which he desires to make it conformable, continued concurrently to the minds of all parties down to the time of its execution. The evidence must be such as to leave no fair and reason-

able doubt upon the mind that the deed does not embody the final intention of the parties." (Kerr on Mort., 421.)

We respectfully submit that in view of the evidence, the jury was without testimony establishing "in the clearest and most satisfactory manner" the alleged mistake; that "the evidence was not such as to leave no fair and reasonable doubt upon the mind that the contract does not embody the final intention of the parties." The jury's finding on the issues of mutual mistake were, in our opinion, clearly unsupported by the evidence and did not satisfy the salutary and wholesome rule preventing reformation of an unambiguous written contract by parole testimony.

The jury found in answer to Question No. 4, that in case of prior shipments the carrier delivered the same to the Peters Commission Company prior to the payment of the drafts attached to the bills of lading. (Tr. p. 29.) In answering Question No. 5 the jury found that in case of such prior shipments the First National Bank had notice prior to the arrival of the shipments in question that the delivering carrier had made such prior deliveries before payment of the drafts. (Tr. pp. 29-30.) In answering Question No. 6 the jury found that in reliance upon the ratification and acquiescence of the

254 First National Bank in the delivery of said prior shipments before the payment of the drafts that the delivering carrier delivered the shipments in question without payment of the draft attached to the bill of lading. In answer to Question No. 7 the jury found that acquiescence or ratification of the First National Bank of the delivery of the previous shipments before payment of the drafts was sufficient to induce the belief on the part of the agent of the delivering carrier that the Peters Commission Company was duly authorized to receive said cattle from the First National Bank.

In attacking the jury's finding on these last mentioned questions, we desire to call the court's attention to the testimony of John F. Waite, the manager of the Peters Commission Company, who stated:

"The previous shipments were delivered to the yard man of the J. P. Peters Commission Company. The collector of the First National Bank did not know of the delivery of the previous shipments, nor did the bank. Nothing was done by the bank with reference to the previous shipments with reference to whether they were paid and sums of money arising from their sale." (S. F. 25-26.)

A. C. Jobs, who was vice-president of the First National Bank in Kansas City in October, 1911 (S. F. 16), testified:

"If the railway companies, or either of them, at any time gave notice to said bank that said cattle had arrived in Kansas City, it was not brought to my attention." (S. F. 17.)

No other witness testified regarding the issues presented by Question No. 5. No evidence from any source was introduced showing

that the First National Bank of Kansas City had notice of deliveries of prior shipments before the payment of drafts. Not only is there an utter lack of evidence affirmatively showing that the bank
255 had such notice, but if the statement of the witness, Waite, who was the manager of the Peters Commission Company, is true:

"The collector of the First National Bank did not know of the delivery of the previous shipments, nor did the bank." (S. F. 25.)

it is shown thereby that the bank did not have such notice. Certainly, it was incumbent upon the railroad company in support of its plea of notice to affirmatively show such notice to the bank. We have carefully read and re-read the testimony on this question, and do not find any evidence in support of such finding.

The answer of the jury to Question No. 6 is likewise unsupported by the facts, because there was no evidence showing that the railroad company relied upon a ratification or acquiescence of the First National Bank in making the prior deliveries before payment of the drafts. There was no evidence that the railroads or any of their employees knew of the payment or non-payment of any drafts. It is true the carriers knew of the deliveries, and the defendants proved that deliveries were made on the way bills, and not on the bills of lading, but there was no evidence to the effect that the railroad companies delivered the shipment in question because of the fact that the First National Bank had theretofore known of deliveries before payment of drafts. In other words, there is not a scintilla of testimony in the records showing that the delivering carrier, or
any of its employees, knew anything regarding the payment
256 or non-payment of drafts, or placed any reliance upon the ratification or acquiescence of the First National Bank in such previous deliveries before payment of the drafts.

There were three witnesses that testified regarding the various deliveries involved in this controversy, John F. Waite, a witness for the defendant, was manager for the J. P. Peters Commission Company. In giving evidence for the defendants, he stated that the deliveries were made on way bills and stubs of the way bills, and that it was the custom at that time to make deliveries on such way bills; said witness Waite did not at any time testify or state that the delivery of the shipment in question was made because previous shipments had been delivered before the drafts were paid.

John Fox, who was livestock agent for the railroad company in Kansas City, in October, 1911, stated that it was the custom to handle shipments of cattle on the way-bills and that the contracts were not used; that none of the carriers knew anything about the contracts; the receiving agents of the carrier rarely, if ever, knew anything about the contract until surrendered to them or offered to be surrendered to the receiving agent for the purpose of obtaining return transportation for the caretakers. (S. F. 32.)

This witness seemed to give the true reason for delivering the cattle to Peters Commission Company when he said:

"They deliver them to the stockyards company and take them out without regard to who they are consigned * * *." (S. F. 32.)

257 The witness further stated that the shipments were handled on way bills because that was the only means of delivery to the stockyards. (S. F. 33.)

E. F. Reese, who was local livestock agent at the Kansas City stockyards for the Chicago, Rock Island & Pacific Railroad, in October, 1911, reiterated what the previous witness had said, that the shipment in question and other shipments were handled on the original way bills and stubs and that it was the generally known custom in Kansas City to make deliveries of cattle in that manner. It was proven by the defendants that the deliveries were made on the way bills and stubs of the way bills, and that such was the generally known custom in Kansas City. No testimony was introduced showing that the delivery of the shipment in question was made by the railroads in a reliance upon, or acquiescence of, the First National Bank of the prior shipments before the payment of the drafts. The evidence tends to show that some prior shipments had been delivered before the payment of the drafts. But a careful search of the testimony fails to reveal any evidence indicating any knowledge on the part of the railroads or their agents of such facts. There is certainly nothing in the record suggesting that they relied thereon, and if the evidence of the three witnesses for the defendants, who knew and testified regarding the deliveries, is to be believed, all the deliveries were made without regard to the contract or bill of lading or payment of the drafts before delivery.

258 In its last analysis, the findings of the jury decided:

(a) That the bill of lading should have provided "The First National Bank, care of J. P. Peters Commission Company."

(b) That previous shipments had been delivered before payment of drafts, which was known by the First National Bank, and relied upon by the delivering carrier.

As to (a) should it be held that there was sufficient evidence to support the findings of the jury on the mutuality of mistake in the terms of the bill of lading; and that the carrier's negligence should not prevent the reformation; and that the parties can be put in statu quo; the plaintiff was, nevertheless entitled to a judgment because the carrier could not receive and deliver the shipment to the Peters Commission Company had the bill of lading provided for delivery "in care of the Peters Commission Company."

Eliminating the question of special agency, for the present, the jury also was wholly without evidence to find:

(1) That the first National Bank had notice of prior deliveries before the payment of the drafts.

2. That said orders to deliver said cattle were in fact First National Bank in said prior deliveries before payment, the carrier de-

livered the shipment in question to the J. P. Peters Commission Company.

(3) Or, that the ratification of the First National Bank was sufficient to induce the belief on the part of the agent of the delivering carrier that the J. P. Peters Commission Company was duly authorized to receive said cattle for the First National Bank.

Being confident that the record does not support the findings of the jury as regards Questions 5, 6 and 7, the remaining part of the jury's verdict, to-wit: the mutuality of mistake in failing to bill the cattle care of J. P. Peters Commission Company, should have no influence on the result of the issues involved. Withdrawing, therefore, from the consideration of the court the answers of the jury to Questions 5, 6 and 7, the case has resolved itself into purely a question of law, and the construction of the bill of lading. On the other hand, should it be concluded that the jury's answers to Questions 5, 6 and 7 are supported by the evidence and entitled to consideration by this court, the issues therein are immaterial, because the First National Bank was only a special and collecting agent for the City National Bank, and the City National Bank being without knowledge of said facts is not bound by the findings of the jury on said questions.

We conclude that the authorities hereinabove cited, as well as the Federal Statute governing interstate shipments, settles the controversy against the carriers.

Wherefore, premises considered, appellant says that this case should be reversed and rendered, and if it cannot be reversed and rendered, that it should be reversed and remanded.

Respectfully Submitted,

DYER, CROOM & JONES,
Attorneys for Appellant.

Court of Civil Appeals, El Paso, Texas. Filed Aug. 13th, 1920.

J. I. DRISCOLL,

Clerk,

By E. J. REDDING,

Deputy.

Brief of Appellees.

In the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas, at El Paso, Texas.

No. 1116.

CITY NATIONAL BANK OF EL PASO, TEXAS, Appellant,

VS.

EL PASO & NORTHEASTERN RAILROAD COMPANY et al., Appellees.

There are omissions from the "statement of the nature and result of the suit" as contained in appellant's brief, the effect of which is to create at once an erroneous impression as to the character of the case as shown by the record. Appellees submit, therefore, the following statement, as additional to the "statement of the nature and result of the suit" as contained in appellant's brief.

1. By special answer appellees allege that the live stock contract was entered into by the City National Bank, plaintiff below, appellant herein, and executed by its agent, J. A. Peters; that all of the negotiations covering the shipments were conducted for said bank by said Peters, who instructed appellees to deliver said
261 cattle to J. P. Peters Commission Company, which they did, in discharge of their duty under said contract. (Tr. p. 8).

2. That said orders to deliver said cattle were in fact a part of said contract for the transportation of said cattle, but the failure to endorse said orders on said contract was due to the mutual mistake of appellant and appellees. (Tr. pp. 10, 11).

3. By reason of having shipped a large number of cattle, aggregating some 150 cars, being of the same lot of cattle as those involved in this suit, just prior to this shipment, at various dates during September and October, 1911, causing them to be delivered to J. P. Peters Commission Company under circumstances identical with those governing this shipment, appellant induced and lead appellees to believe that a delivery to J. P. Peters Commission Company was in full accordance with the live stock contracts and way-bills and was satisfactory to, and desired by, appellant, and, acting upon such belief so induced by the agents of said consignor, City National Bank, appellees delivered these cattle as they had delivered the others, to J. P. Peters Commission Company, all of which facts were well known to the consignor, City National Bank, and it is now estopped to question the validity and correctness of the delivery made in this instance. (Tr. p. 12).

4. Appellees further alleged, upon information and belief, that by reason of a community of interests and financial business relations between appellant and John Cameron and J. P. Peters Com-

262 mission Company (Tr. p. 16) that it was the intention and purpose of the consignor, City National Bank, that the cattle should be delivered to J. P. Peters Commission Company, and that they should sell them and pay the draft drawn for advance charges paid by said City National Bank. (Tr. p. 13).

5. Appellees alleged that the First National Bank of Kansas City was notified of the arrival of said cattle in Kansas City, and that they had been delivered to J. P. Peters Commission Company but that they had not yet been sold and that said bank, through its agent, acquiesced in, and consented to, the possession of said cattle by the J. P. Peters Commission Company and the delivery of said cattle to it, and no objection was made by said bank to the J. P. Peters Commission Company handling said cattle. (Tr. p. 13).

6. By trial amendment appellant alleged that it was through the negligence, carelessness, omission and fault of appellees in permitting said bill of lading to be issued and delivered to appellant without giving notice or advising it that there had been directions or instructions by J. A. Peters to ship the cattle to the First National Bank of Kansas City, care J. P. Peters Commission Company, and had said bill of lading contained said directions appellant would not have accepted the same, but accepted and received said bill of lading and relied thereon without notice of said intentions, and had said bill of lading contained said directions appellants would have notified appellees not to deliver said cattle to J. P. Peters Commission Company, and by reason of their conduct in so putting into
263 circulation, issuing and delivering said bill of lading without said instructions, care J. P. Peters Commission Company, appellees are estopped to deny same, its effects or validity. (Tr. p. 24).

7. J. F. Williams, Vice-President of the City National Bank of El Paso, appellant, testified: "I remember the shipment of cattle in question and the incidents concerning the same * * * I was connected with the bank at the time * * * and handled the transaction myself. I know J. A. Peters. He was not employed by the bank. In connection with the shipment in question he was assisting John T. Cameron in bringing the cattle out of Mexico, and did that part of the work, loading and getting the bills of lading, and attending to the shipping. I think Mr. Peters brought me this bill of lading * * * I suppose that technically John T. Cameron might be considered the owner of the cattle in question; the Bank had advanced the full purchase price on the cattle. These cattle were being moved to Kansas City to market. Mr. Cameron was buying cattle in Mexico at the time * * * After they came over on the American side, we then refunded or advanced to the Chihuahua bank the amount they had advanced on the cattle; then we took the transaction over from Mr. Cameron and advanced the money to pay them back, and shipped them to Kansas City for sale. We had no arrangements for anybody to handle them for us in Kansas City. * * * The cattle were loaded into the cars under

a release and then billed out under our instructions. I did not personally go down to the railroad office to ship them. No one from the bank personally went and looked after that. There had
264 been quite a number of these shipments prior to this particular one, and Mr. Peters had looked after all, or nearly all, of them. I knew that he had been looking after the shipments.
* * * We presumed that he was shipping these cattle to Kansas City and that they were being handled there by J. P. Peters Commission Company. On other shipments the returns had been made to us prior to delivery, so far as we knew. We knew that these cattle were being handled by the J. P. Peters Commission Company.
* * * I knew that J. A. Peters was the son of J. P. Peters, head of the J. P. Peters Commission Company, and that these cattle were being delivered to J. P. Peters Commission Company on payment of the drafts. * * * This was the last shipment of the Mexican cattle, and up to that time we had received, so far as I know, the returns on the former shipments. It seems to me we were handling these cattle probably for several months. * * * I cannot say positively; but we handled a good many train loads, under the same arrangements, and I presume they all went to the J. P. Peters Commission Company eventually, I advanced the money to John T. Cameron, on these cattle, and sent them on to Kansas City, well, I don't know, we didn't know whether they were to be sold on the market in Kansas City or not, the presumption was—but we had no understanding, they were to be delivered when we got the money. It was John T. Cameron's lookout if he could not pay until he got the money from the sale. We had the cattle and were supposed to get the money. We knew somebody had to take them from Mr.
265 Cameron. I did not know that they necessarily would have to be sold before Mr. Cameron or anybody else could remit the money to us; somebody might have sufficient money before they were sold. I have no individual in mind that might pay for them before they were sold. * * * As to whether or not we knew that in all probability the cattle would have to be sold before the money was paid and sent through the bank to us, the only security we had in advancing the money on those was to ship to somebody we knew to be absolutely responsible which was our bank in Kansas City. The bank was instructed to deliver the cattle when the draft was paid. We did not have any agreement or arrangement with the First National Bank of Kansas City, whereby the bank was to pay us this draft before the cattle were sold. I did not know that these cattle would have to be sold before the money would be turned into the bank to remit to us. I would say that this would not be true. I do not say that we had any arrangements with anybody to pay this draft before the cattle sold. We were not interested in who or how the draft was to be paid as long as they were in our possession. They were not to be delivered until the draft was paid. It was up to Mr. Peters to get the money and pay the bank,—or somebody. It was our understanding that Mr. Peters was to handle these cattle after they got to Kansas City. I did not understand that Mr. Peters would have to have possession of these cattle in order that he might

handle them in that way. We did not rely upon Mr. Peters getting the money for these cattle and turning the money into the First National Bank; we relied upon somebody paying the bank the money before the cattle were delivered. Nobody had a right to sell the cattle until they were released, and nobody could release them until the money was paid; that was exactly the understanding. We had no arrangements whereby anybody would furnish the money before the cattle were sold. * * * We were allowing Mr. J. A. Peters to bill them out for us and look after getting them up there, and we knew that somebody had to make some arrangements to get the money to pay for them after they got there. There was nobody else that went up there that was concerned about them except Mr. Peters and the J. P. Peters Commission Company, except the bank was our agent. We did not expect the bank to get out and sell them; we expected somebody outside the bank to handle them. * * * They (the bank) were acting for us in the matter, as collecting agent" (S. F. pp. 17 to 24).

8. John F. Waite, office manager for J. P. Peters Commission Company testified concerning the payment of the several drafts prior to the one involved in this case, sent by the City National Bank of El Paso to the First National Bank of Kansas City, for collection on the shipments of cattle prior to this shipment, as follows: "There had been about seven shipments, on the 4th, 5th, 7th, 11th, 13th, 23rd and 27th (October); those shipments were preceding this. On all the previous shipments, before the cattle were sold and delivered, after reaching the Peters Commission Company, they had taken up and paid a draft drawn against the Peters Commission Company through the First National Bank of Kansas City. In some cases the draft did not get there before the cattle; in those cases the draft was held until the cattle were entered and sold. In those instances in which the cattle reached there before there was a sale, the draft had not been taken up and paid before the cattle were delivered to the purchaser. I have not stated that they would come down with the draft, and before the cattle were sold and delivered that the company would give a check for the amount that was represented by that draft, drawn by the City National Bank on the First National Bank. If the cattle came first and were sold, when the draft was presented we paid it; if the draft came before the cattle were in the yards they would hold the draft until the cattle were sold" (S. F. pp. 26-27) * * * A representative of the bank had been in our office or place of business the day these cattle arrived. He was a collector. He had been there at other previous times with reference to drafts on shipments. * * * He was not there the day before this shipment came in; he did not ask anything about these cattle; I told him the cattle were not in yet. He was there the next day. The cattle were in the pens of the J. P. Peters Commission Company. I did not tell him they were in the pens of the J. P. Peters Commission Company. Nothing was said by him with reference to that matter. I suppose the cattle were sold in the course of

a half hour after he left. These cattle were down there when the collector of the First National Bank of Kansas City, Missouri, came down and asked me about them (S. F. p. 25).

268 9. J. A. Peters testified: "I was connected with the shipment of cattle in question. * * * I took charge of them, not only at the instance of the City National Bank, but also Mr. Cameron and the Peters Commission Company of Kansas City. * * * I signed all of the Contracts and looked after that, and all the shipments we had I signed the live stock contract under which the cattle moved out of here, as agent of the City National Bank. I signed it City National Bank, by J. A. Peters. I had been handling all of those shipments; this was one of numerous shipments. This is the contract which I executed, that bears date October 27th. These are the waybills issued by the El Paso & Southwestern System, dated October 27th, 1911, under which the cattle in question moved. It appears in those waybills that the cattle were consigned by the City National Bank to the First National Bank of Kansas City, care of J. P. Peters Commission Company. I billed them that way. * * * That is the billing I gave the clerk at the railroad, that issued the bill of lading at the joint warehouse. I think I gave the agent the directions with reference to the shipment at the same time the contract was executed. My recollection is so, undoubtedly so. When I executed the contract I directed him how to bill, I directed him to bill care of the J. P. Peters Commission Company. I don't remember exactly but I should judge that was about the eighteenth or twentieth train of cattle that we handled from Mexico, consigned to the First National Bank of Kansas City about that time. Practically all of those cattle were handled under
269 the same agreement between Mr. Cameron and the City National Bank and myself. * * * I do not remember if I took the contract under which these cattle moved after I had executed it. I might have taken the contract at that time, or they might have called a messenger, and had it sent up to the bank; we bill the cattle out, but we don't get the contract until after the cattle are loaded, so they can put the car numbers on them. It was customary at that time, if I had time I sent down and got the duplicate contract myself, but if I was busy I sent a messenger. * * * After I had given the directions about the waybills and the contracts had gone to the bank, I signed the draft, to which the duplicate contract was attached. * * * I think the City National Bank made demand on myself, on J. P. Peters Commission Company, and on Mr. Cameron, for the payment of the amount of that draft that had been drawn against the cattle at that time; I know they did on the J. P. Peters Commission Company. They demanded payment of the draft. The draft represented the cost in Mexico, less the United States duties at this port. Mr. Cameron loaded the cattle in Mexico and drew on the City National Bank for the cost of the cattle. When the cattle arrived here the J. P. Peters Commission Company paid the American duties on the cattle, and on account of that equity in the cattle the City National Bank

handled the purchase price in Mexico. The freight and feed charges followed the cattle to Kansas City." (S. F. pp. 28-30).

10. J. C. Wallwork, joint warehouse, El Paso, Texas testified:
"Waybills, should be made out in conformity with the bills
270 of lading or shipping contracts unless sometimes the contracts
are made, and then they come around and ask you to add
something in there, and in your hurry the billing clerk is liable to
forget to put it on the order; that has been known in several cases;
it is an oversight of the railroad if they fail to put that on the con-
tract. I was joint agent for the four lines here in El Paso, viz. the
Santa Fe, the G. H. & S. A., Texas & Pacific and the E. P. & S. W.
System. I did not talk to Mr. Peters at the time they were issued.
I talked to him on several shipments. In this bill of lading the
consignor is City National Bank. Our waybills make them consignee,
care Peters Commission Company. That is not on the bill of lading;
that was an oversight there." This witness also testified that he had
a conversation with J. A. Peters concerning this shipment. (S. F.
pp. 40, 41.)

11. Appellant introduced in evidence the duplicate bill of lading
which contains the following clause:

"Eleventh." No person other than the owner of the stock shipped,
or his duly authorized agent in the name of the owner shall be
allowed to sign this contract."

12. Ed. W. Jarvis, billing clerk, testified: "J. A. Peters issued
the billing instructions on those cattle. His instructions were the
cattle were billed from the City National Bank to the First National
Bank of Kansas City, Missouri, care J. P. Peters Commission Com-
pany. J. A. Peters signed the live stock contract on behalf of the
City National Bank." (S. F. p. 35).

271 13. E. F. Reese, local live stock agent at Kansas City Stock
Yards, for the Chicago, Rock Island & Pacific, testified: "I
knew of the shipment of October 27th, 1911, in question, and I knew
of the previous shipments inquired about. The shipment of October
27th was handled in delivering on the original way-bills to the
First National Bank, care J. P. Peters Commission Company.
* * * I handled all the waybills for all livestock coming into
the Kansas City stock yards, and it was by virtue of that position
that I know that shipments for the City National Bank was handled
on those waybills. I was billing on the stock, that is, the billing that
accompanies the shipment to its destination. My only information
as to what the City National Bank had done at any time was from
the billing instructions. My information was gained by the way bills.
That was the only evidence I had of it. Without the waybills we
would be unable to deliver the stock."

14. The case was submitted on special issues and in answer to ques-
tion No. 1, the jury found that: "Contemporaneous with, or just prior
to, the execution of the bill of lading covering the shipment of cattle
in question in this suit, it was mutually agreed by and between J. A.

Peters, acting for the City National Bank, and the agent of the receiving carrier at El Paso, Texas, that such cattle should be consigned by the bill of lading to the First National Bank of Kansas City, Missouri, care of the J. P. Peters Commission Company." (Tr. p. 28).

15. In answer to question No. 2, of the special issues, the jury found that: "When the bill of lading covering the shipment
272 of cattle in question was issued that the same by mutual mistake of J. A. Peters, acting on behalf of the City National Bank, and the said agent of the defendant carriers, acting in their behalf, omitted to state in the bill of lading, in accordance with their mutual agreement, that the cattle were consigned to the First National Bank, care of the J. P. Peters Commission Company. (Tr. p. 29).

16. In answer to question No. 3, the jury found that: "J. A. Peters directing the agent of the defendant carriers receiving the cattle at El Paso, shipment of which is in question, to place on the waybill that the cattle were consigned to the First National Bank of Kansas City, in care of the J. P. Peters Commission Company." (Tr. p. 29.)

And in answer to supplemental question by the court, found that such direction was contemporaneous with the execution and delivery of the bills of lading covering this shipment of cattle. (Tr. p. 29).

17. In answer to question No. 4, the jury found that: "In case of prior shipment of cattle inquired about in question — *ment in question*, said prior shipments consigned by bills of lading by the City National Bank of El Paso, Texas, to the First National Bank of Kansas City, that the delivering carrier delivered same to the J. P. Peters Commission Company at Kansas City, prior to payment of the drafts drawn on the Peters Commission Company attached to the bills of lading." (Tr. p. 29.)

273 18. In answer to question No. 5, the jury found that: "In case of prior shipment of cattle inquired about in question No. 4 that the First National Bank had notice prior to the arrival of the shipment in question herein, that the delivering carrier had delivered such prior shipments, or some of the same, to the Peters Commission Company prior to the payment of the drafts drawn on said Peters Commission Company for such prior shipments, and the said bank ratified and acquiesced therein. (Tr. p. 30.)

19. In answer to question No. 7, the jury found that: "In reliance upon the ratification or acquiescence of the First National Bank of Kansas City in the delivery of said prior shipments of cattle to J. P. Peters Commission Company, before the payment of the drafts attached to bills of lading, that the delivering defendant delivered the shipment of cattle in question in this suit to the J. P. Peters Commission Company without the payment of the draft attached to the bill of lading." (Tr. p. 30.)

20. In answer to question No. 4, requested by the plaintiff, the jury found that: "Had such bill of lading recited that the cattle

were to be delivered to the First National Bank, care J. P. Peters Commission Company, that plaintiff would not have notified the defendants prior to the delivery to the J. P. Peters Commission Company not to deliver said cattle without payment of the draft in the First National Bank of Kansas City." (Tr. p. 30-31.)

274 Appellees' Objections to Consideration of Appellant's First Assignment of Error.

Appellees submit to the court that appellant's first assignment of error cannot be considered for the following reasons:

1. The statement under said assignment does not contain the requested charge upon which said assignment is based.

2. It appears from the record that appellant waived its request for peremptory instruction, if in fact, it made such request, the case having been submitted upon special issues, with no apparent reservations or objections by appellant, and one of the appellant's special issues, No. 4, having been submitted to the jury by the court.

Statement.

Appellant alleged that the carrier companies, appellees, were partners. (Tr. p. 2.) This allegation was denied by sworn answer. (Tr. pp. 5, 18.) Appellees allege that on the dates mentioned in plaintiff's petition, the El Paso & Northeastern Railroad Company owned and operated a line of railroad situated in the State of Texas, extending from the city of El Paso to the boundary line between Texas and New Mexico, at about a station called Newman. (Tr. pp. 5, 6.)

W. S. Dawson testified with reference to the location of the several lines of railroad involved, that the El Paso & Northeastern Railroad extends from El Paso to Newman, New Mexico. (S. F. p. 4.)

275 The only reference to appellant's special question No. 1, which we have found in the record, is that made in "Plaintiff's Bill of Exception No. 1" (Tr. p. 49) wherein appellant complains of the action of the court in refusing its "special question No. 1." In this Bill of Exception appellant makes no reference to and does not show that the El Paso & Northeastern Railroad Company was included among the defendants against whom an instructed verdict was requested.

As to the waiver of the request for peremptory instruction, the record shows that appellant submitted "special question No. 3," requesting the court to submit to the jury the question as to whether the City National Bank relied on the bill of lading as expressing the true contract between the parties, etc. (Tr. p. 27.) There is nothing to indicate that this requested instruction was made subject to the action of the court on the request of appellant for peremptory instruction. There seems to be no record of "Question No. Four, Requested by Plaintiff" except as it appears in the verdict of the jury, but from the reading of this special question there is nothing to in-

dicade that it was made subject to the refusal of the request for peremptory instruction.

Authorities.

Zeiger v. Woodson, 202 S. W. 164;
Vernon's Sayle's Civil Statutes, 1471.

In the event the court shall consider appellant's first assignment of error, appellees submit the following counter proposition:

276 Appellees' First Counter Proposition under Appellant's First Assignment of Error.

Appellant having alleged breach of an agreement on the part of appellee to deliver the cattle to First National Bank of Kansas City, and it appearing from the evidence and appellant's admission that by the shipping contract the cattle were consigned to First National Bank of Kansas City, care of J. P. Peters Commission Company, and it appearing further that the cattle were delivered in accordance with such contract, appellant can not in any event recover, and there was no error prejudicial to appellant in submitting the case to the jury.

Statement.

Appellant alleged that the El Paso & Southwestern Company and El Paso and Northeastern Railroad Company, acting for themselves and their codefendants agreed in writing to carry from El Paso to Kansas City the live stock involved in this suit and "there to deliver to the First National Bank" said live stock, and that "defendants did not safely carry and deliver said cattle in pursuance of said agreement." (Tr. pp. 2, 3.)

By special answer appellees alleged that the live stock contract was entered into by the City National Bank, plaintiff below, appellant herein, and executed by its agent, J. A. Peters; that all negotiations covering the shipment were conducted for said bank by said Peters who instructed appellees to deliver said cattle to J. P. Peters Commission Company, which they did, in discharge of their duty under said contract. (Tr. p. 8.)

277 That said orders to so deliver said cattle were in fact a part of said contract for the transportation of said cattle, but the failure to endorse said orders on said contract was due to the mutual mistake of appellant and appellee. (Tr. pp. 10, 11.)

Appellant admits in its brief for the purpose of this assignment (appellant's first assignment of error) that "it was by the mutual mistake of said agent of the carrier and the said J. A. Peters that the bill of lading did not consign the cattle to the First National Bank, care J. P. Peters Commission Company." (Appellant's Brief p. 30.)

It is admitted by agreement of counsel for all parties that the

cattle were delivered to J. P. Peters Commission Company at Kansas City. (S. F. p. 19.)

J. F. Williams testified: "We were allowing Mr. Peters to bill them out for us." (S. F. p. 23.)

J. C. Wallwork testified: "In this bill of lading the consignor is City National Bank and Consignee First National Bank. That is not on the bill of lading that was an oversight there." (See Par. 10 p. 11 this brief.) (S. F. pp. 40, 41.)

J. A. Peters testified that he knew why the cattle were "consigned" to J. P. Peters Commission Company in this particular case. (S. F. p. 30, 31.)

Ed. W. Jarvis testified: "J. A. Peters issued the billing instructions on the cattle. His instructions were the cattle were billed from the City National Bank to the First National Bank of Kansas City, care

J. P. Peters Commission Company." (S. F. p. 35.)

278 J. A. Peters testified: "It appears in those way-bills that the cattle were consigned by the City National Bank to the First National Bank of Kansas City, care J. P. Peters Commission Company * * * that is the billing I gave the clerk of the railroad that issued the bill of lading at the joint warehouse." (S. F. p. 29.)

Authorities.

St. L. B. & M. Ry. Co. vs. McDavit Bros., 165 S. W. 5;

Express Co. v. Hammer, 51 N. E. 953;

Ela v. Express Co. 29 Wis. 611;

Elliott on Railroads, 2nd Ed. Par. 1524a.

Argument.

The suit is for damages for failure to deliver the cattle to the consignee, First National Bank. Appellant admits that the consignee was First National Bank, care J. P. Peters Commission Company, and admits that the cattle were delivered to the J. P. Peters Commission Company. This admission, in our opinion, settles the case as a matter of law, but appellant takes the position that this delivery was not in accordance with the contract because the consignor retained the power of disposition in the bill of lading by the agreement to deliver to "consignor or order," and argues that a delivery to the consignee would not be proper. Whatever of merit there might be in this contention, if made under appropriate pleadings, is immaterial here, because appellees are charged in the plead-

ing with breach of the contract for not delivering to the consignee, and are not charged under any allegation in appellant's petition with breach for failure to deliver to consignor.

279 In our view of the case we cannot harmonize appellant's contention in this court with its position in the Trial Court. There it sued appellees for failure to deliver to the First National Bank of Kansas City. Here it declares that "the carrier was not authorized to make delivery, either to the First National Bank or the J. P. Peters Com-

mission Company, without an order from the shipper." (Appellant's Brief, p. 30.) In view of the inconsistent attitude on the part of appellant, and to meet such contention, even though it be inconsistent, we submit the following alternative proposition.

Second Counter Proposition under Appellant's First Assignment of Error.

Under a shipping contract providing delivery to consignor or order, instructions by consignor to carrier, given contemporaneously with the execution of such contract, to deliver to a person or concern specified, at destination, is, in contemplation of the parties, such "order as warrants a delivery to such person or concern, and when the shipment is so delivered the contract is performed and is not error prejudicial to the consignor in its suit for wrongful delivery to submit the question of liability to the jury.

Statement.

It was provided in clause thirteen of the shipping contract that the cattle should be delivered to consignor City National Bank, its order or assigns. (S. F. p. 13.)

280 The shipping contract was signed on behalf of the bank, by J. A. Peters. (S. F. p. 14.)

The contract was offered to and is relied upon by appellant as the basis for its suit. (S. F. p. 7—Tr. pp. 2-3.)

The contract provided: "Eleventh: No person other than the owner of the stock shipped, or his duly authorized agent in the name of the owner shall be allowed to sign this contract." (S. F. p. 13.)

J. A. Peters testified: "It appears in those way bills that the cattle were consigned by the City National Bank to the First National Bank of Kansas City, care J. P. Peters Commission Company

* * * That is the billing I gave the clerk at the railroad.

* * * I think I gave the agent the direction with reference to the shipment at the same time the contract was executed. My recollection is so, undoubtedly so. When I executed the contract I directed him how to bill it. I directed him to bill care J. P. Peters Commission Company. (S. F. p. 29.) * * *

I know the reason why the cattle going to Kansas City were consigned to J. P. Peters Commission Company in this particular case. I might explain that better by an illustration of one shipment that arrived there during the night in very poor condition, and being billed to the bank, we could not get the cattle released until the bank opened in the morning, and by the time we got back with the bill it would be about 9.30, so that by the time we got possession of the cattle and fed and watered them, the day's market would be over. That happened during the fore part of the shipments. Subsequent

281 to that time the waybills were changed so as to send them care of the J. P. Peters Commission Company." (S. F. p.

31.)

The case was submitted on special issues and in answer to question No. 1, the jury found that: "Contemporaneous with, or just prior to, the execution of the bill of lading covering the shipment of cattle in question in this suit, it was mutually agreed by and between J. A. Peters, acting for the City National Bank, and the agent of the receiving carrier at El Paso, Texas, that such cattle should be consigned by the bill of lading to the First National Bank of Kansas City, Missouri, care of the J. P. Peters Commission Company." (Tr. p. 28.)

Argument.

J. A. Peters who, under the contract, was duly authorized, ordered the carrier to deliver the shipment to J. P. Peters Commission Company. His act was the act of the consignor and the delivery was to the order of consignor, in compliance with the thirteenth clause of the contract. The long list of authorities recited, and the learned argument of counsel in their brief for appellant, have no application to this case, because the delivery was made in this case in accordance with the mutual agreement of the shipper and carrier in the first instance and by express direction and order of the consignor under clause thirteen of said contract.

282 Appellee's Counter Proposition under Appellant's Second Assignment of Error.

The consignor having given its directions to the carrier to deliver the shipment to First National Bank, Kansas City, care J. P. Peters Commission Company, and delivery having been made in accordance therewith, there is no error in the judgment for appellees.

Statement.

Same as under first and second counter propositions under appellant's fourth assignment of error, post p. 29-30 this brief.

Authorities.

Same as under First Counter Proposition under First Assignment of Error.

Appellees' First Counter Proposition under Appellants' Third Assignment of Error.

Where the written instrument does not express the actual mutual agreement between the parties by reason of the omission of some essential feature of such agreement, the written instrument will be reformed so as to express the actual agreement.

Statement.

J. A. Peters testified: "It appears in those waybills that the cattle were consigned by the City National Bank to the First National

Bank of Kansas City, care J. P. Peters Commission Company
 * * * that is the billing I gave the clerk of the railroad
 283 that issued the bill of lading at the joint warehouse." (S. F.
 p. 29.) (See also par. 9, anti p. 9-10, this brief.)

Ed. W. Jarvis testified: "J. A. Peters issued the billing instructions on those cattle. His instructions were the cattle were billed from the City National Bank to the First National Bank of Kansas City, care J. P. Peters Commission Company." (S. F. p. 35.)

J. F. Williams testified: "We were allowing Mr. Peters to bill them out for us." (S. F. p. 23.) (See also par. 7, anti p. 4-7 this brief.)

Clause "Eleventh" of the bill of lading reads: "No person other than the owner of the stock shipped, or his duly authorized agent in the name of the owner, shall be allowed to sign this contract." (S. F. p. 13.) The contract was signed on behalf of the bank by J. A. Peters and offered in evidence and relied on by appellant as the basis of its suit. (S. F. p. 7.)

J. C. Wallwork testified: "In this bill of lading the consignor is the City National Bank and consignee First National Bank. Our waybills make them consignee, care J. P. Peters Commission Company. This is not on the bill of lading; that was an oversight there." S. F. pp. 39-40.)

The case was submitted on special issues and in answer to question No. 1, the jury found that: "Contemporaneous with or just prior to, the execution of the bill of lading covering the shipment of cattle in question in this suit, it was mutually agreed by
 284 and between J. A. Peters, acting for the City National Bank, and the agent of the receiving carrier at El Paso, Texas, that such cattle should be consigned by the bill of lading to the First National Bank of Kansas City, Missouri, care J. P. Peters Commission Company." (Tr. p. 28.)

Authorities.

Bradford v. The Union Bank of Tennessee, 13 Howard 57;
 Harrell v. De Normandie, 26 Tex. 120;
 May v. Taylor, 27 Tex. 125;
 Gilson v. Craig, 1 Tex. App. Civ. Cases, section 42;
 Brown v. Montgomery, 89 Tex. 250.

Appellees' Second Counter Proposition under Appellant's Third Assignment of Error.

Where the reformation of the written instrument to make it conform to the agreement actually made is necessary to maintain the status quo of the parties, the instrument will be reformed.

Statement.

See statement under next preceding counter proposition.

Appellants by trial amendment plead that if the bill of lading had contained the directions or instructions by J. A. Peters to bill or ship said cattle to First National Bank of Kansas City, care J. P. Peters Commission Company, it would not have accepted the same, but would have notified appellees not to deliver said cattle to said Peters Commission Company. (Tr. p. 23.)

285 Appellants requested the court to submit its special question No. 4, as follows: "Do you find from the evidence, by a preponderance thereof, that had such bill of lading recited that the cattle were to be delivered to the First National Bank, care of the J. P. Peters Commission Company, that plaintiff would have notified defendants prior to the delivery to the J. P. Peters Commission Company not to deliver said cattle without the payment of the draft in the First National Bank of Kansas City? To which special question the jury answered, "No."

Authorities.

Ross v. Armstrong, 25 Supp. 368;

Keley v. Ward, 94 Tex. 289.

Argument.

Appellants' able counsel, finding themselves in a most embarrassing predicament with relation to the unanswerable facts in this case, facts which have been determined under proper instruction, by the jury, attempt to amuse themselves and entertain the court by hitching that old proverbial horse to the wrong end of an equally ancient proverbial cart, and, probably for advertising purposes, give the old sport a new stage name, i e. "status quo." The name commands respect regardless of the weakness of the dramatic features of the play, and through respect for the name this criticism of the plot is given:

The Status Quo.

Appellant, according to the record in this case, had some extensive dealings with John T. Cameron. For business reasons, no
286 doubt, it had advanced the money to bring these cattle to the Mexican border at the port of El Paso. After the cattle were brought across the river the cattle were turned over to J. A. Peters, and J. P. Peters Commission Company to "handle." They were being shipped to Kansas City, and appellant, through its most efficient vice president, Mr. Williams "knew that the cattle were being handled by the J. P. Peters Commission Company," and "Knew that the cattle all went to the J. P. Peters Commission Company eventually," and it was the understanding of the appellant that "Mr. Peters was to handle these cattle and get the money and pay into the bank,"

and appellant was "allowing Mr. J. A. Peters to bill them out" for it, and "look after getting them up there," and it knew that "somebody had to make some arrangements to get the mon-y to pay for them after they got there" and that "there was nobody else that went up there that was concerned about them except Mr. Peters and the J. P. Peters Commission Company" except that the bank was the agent of appellant, and Mr. Williams states that there was no "agreement or arrangements with the First National Bank of Kansas City whereby the bank was to pay this draft before the cattle were sold," and that "it was up to Mr. Peters to get the money and pay the bank, or somebody," and appellant "had no individual in mind that might pay for them before they were sold." These are the admissions by Mr. Williams on cross examination, and taken together with his whole testimony, the jury could have reached no other conclusion than it did reach, viz. that appellant had turned these cattle
 287 over to Mr. J. A. Peters to "handle" for it, and to handle them to the best advantage possible, and to use his judgment in the premises and "get the money." The cattle were to be moved to Kansas City. It was desired to ship them over the lines of appellant and then turn them over immediately to the J. P. Peters Commission Company. J. A. Peters so directed the shipment; the carriers so understood the matter; Peters acting for appellant, so understood it; by its findings the jury has determined that appellant so understood it. This then was indeed the contract and the true status of the parties to it. This is the cart with the horse before and properly harnessed and attached. This is the case before the court with all the studied and well *well* worded contradictory phrases left out. This is the showing of "clean hands" by appellees. This is not an attempt on the part of appellees to seek or take advantage of a technicality and cast the other party for damages for an enormous sum of money because of the failure to dot an *i* or cross a *t* in the contract. This is a rightful claim, honestly asserted under the real contract, faithfully performed. If this court can look to the equities in the case, it will find them on the side of appellees where the acts place them and where the jury has determined them to be. There is no attempt here to change the status quo of the parties except the unsuccessful attempt of appellant. If, indeed, a wrong has been done appellant, and we cannot believe it, that wrong has resulted by the acts of appellant's "duly authorized agent," J. A. Peters. "No one from the bank went
 288 to the railroad office to inform the carriers as to the wishes of appellant, says Mr. Williams. "Mr. Peters was looking after billing the cattle out for the bank," says Mr. Williams. Speaking of "clean hands," it occurs to us that appellant has left some tell tale finger prints on the record in this case.

But getting back to the legal phase of the case, we find that appellant by its trial amendment and its special question No. 4 and the answer of the jury thereto is bound inevitably to the proposition that if the bill of lading had contained the direction "care J. P. Peters Commission Company," appellant would not have changed the billing and would not have notified appellees not to deliver the cattle, to J. P. Peters Commission Company without payment of the draft, for

it is well settled that where the Court submits an issue to the jury by special request of a party, and the jury answers the question adversely, such party is bound thereby and cannot be heard to complain of such finding.

First Counter Proposition under Appellant's Fourth Assignment of Error.

Appellant having declared on a written contract executed on its behalf by J. A. Peters containing the provision that, "No person other than the owner of the stock shipped or his duly authorized agent in the name of the owner, shall be allowed to sign this contract," and there being no pleadings which seek to avoid such provisions, and no verified denial thereof, the issue of the agency or authority of J. A. Peters is not raised and there is no error in the judgment for appellees.

280 Statement.

Clause "Eleventh" of the contract provides: "No person other than the owner of the stock shipped, or his duly authorized agent, in the name of the owner, shall be allowed to sign this contract." (S. F. p. 13)

Authorities.

See authorities under following counter proposition.

Second Counter Proposition under Appellant's Fourth Assignment of Error.

Although the question of agency of J. A. Peters is not raised by pleadings, the evidence of such agency is conclusive, and there was no error in rendering judgment for appellees.

Statement.

J. F. Williams, Vice-President of the City National Bank, of El Paso, appellant herein, on cross examination admitted: "The cattle were loaded into the cars under a release and then billed out under our instructions. I did not personally go down to the railroad office to ship them. No one from the bank personally went and looked after that. There had been quite a number of these shipments prior to this particular one, and Mr. Peters had looked after all, or nearly all, of them. * * * I knew that he had been looking after the shipments * * * We presumed that he was shipping these cattle to Kansas City and that they were being handled there by J. P. Peters Commission Company. * * * It was our understanding that Mr. Peters was to handle these cattle after they got to Kansas City, and get the money and pay into the bank. * * * We were allowing Mr. J. A. Peters to bill them out for us and look after getting them up there, and we knew that somebody had to make arrangements to get the money to pay

for them after they got there; there was nobody else that went up there that was concerned about them except Mr. Peters and the J. P. Peters Commission Company, except the bank was our agent." (S. F. pp. 17-24).

J. A. Peters testified: "When I executed the contract I directed the agent how to bill. I directed him to bill care of the J. P. Peters Commission Company."

Authorities.

Great Northern Railway Co. vs. O'Connor, 223 U. S. 508;
American Brake Shoe & Foundry Co. v. Pere Marquette R.
Co. 223 Fed. 1018.

Argument.

Mr. Williams testified: "We were allowing Mr. Peters to bill them out for us." Mr. Peters says he directed the agent to bill care J. P. Peters Commission Company.

Appellees' Counter Proposition under Appellant's Fifth Assignment of Error.

The contemporaneous execution of the contract and direction by the consignor through its duly authorized agent to bill the
291 cattle to First National Bank of Kansas City, care J. P. Peters
Commission Company, is conclusive, and there was no error
in refusing the special instruction No. 3 as complained of by ap-
pellant.

Statement.

Clause "Eleventh" of the contract reads: "No person other than the owner of the stock shipped, or his duly authorized agent in the name of the owner, shall be allowed to sign this contract. (S. F. p. 13.)

J. F. Williams, Vice President of the City National Bank, consignor, referring to the cattle involved in this shipment, testified: "We were allowing Mr. Peters to bill them out for us and look after getting them up there." (S. F. p. 23.)

J. A. Peters testified that, "When I executed the contract I directed the agent how to bill." (S. F. p. 29)

Authorities.

See authorities under next preceding counter proposition.

Argument.

J. A. Peters was the duly authorized agent of appellant. He was allowed to bill the cattle out. His knowledge was the knowledge of his principal, constructively, at least.

Appellant's sixth and seventh assignment of errors will be considered together.

Appellees' Counter Proposition under Appellant's Sixth and Seventh Assignments of Error.

It being provided in the bill of lading that the cattle were to be delivered to consignor, his order or assigns," and appellees having plead that they were ordered by consignor to deliver to First National Bank, care J. P. Peters Commission Company, and it appearing the delivering carrier, who is a party to the suit, could only deliver as directed in the waybills, there was no error by their admission in evidence.

Statement.

The bill of lading, clause thirteenth, provided that the first party, the carrier, would deliver to second party, consignor, or order, or assigns. (S. F. p. 13.)

E. F. Reese, live stock agent for the Chicago, Rock Island & Pacific Railroad, testified: "Without the waybills we would be unable to deliver the stock."

J. F. Williams testified that J. A. Peters was allowed to bill the cattle for the consignor. (S. F. p. 23.)

J. A. Peters testified that he instructed the agent of the carrier to bill the cattle First National Bank of Kansas City care J. P. Peters Commission Company. (S. F. p. 29.)

Appellees alleged that they were instructed to waybill the cattle care J. P. Peters Commission Company, and deliver the same in accordance with such billing which they did. (S. F. p. 8-9.)

Appellees' Counter Proposition under Appellant's Eighth Assignment of Error.

Even though hurtful to it, there is no error in admitting testimony in direct rebuttal of evidence offered by appellant relating to same matter.

Statement.

J. F. Williams, witness for appellant, testified on direct examination: "There had been quite a number of these shipments prior to this particular one, and Mr. Peters had looked after all, or nearly all, of them. I knew that he had been looking after the shipments, yes sir. We presumed that he had been shipping these cattle to Kansas City and that they were being handled there by the J. P. Peters Commission Company. On the other shipments the returns had been made to us prior to delivery, so far as we knew." (S. F. p. 20.)

John F. Waite, office manager for J. P. Peters Commission Company, testified concerning the payment of the several drafts prior to to one involved in this case, sent by the City National Bank of El Paso to the First National Bank of Kansas City for collection on the shipments of cattle prior to this shipments as follows:

There had been about seven shipments on the 4th, 5th, 7th, 11th, 13th, 23rd and 27th (October) Those shipments were preceding

this * * * In some cases the draft did not get there before the cattle; in those cases the draft was held until the cattle were entered and sold. In those instances in which the draft reached there before there was a sale, the draft had not been taken up and paid before the cattle were delivered to the purchaser, I have not stated that they would come down with the draft and before the cattle were sold and delivered that the company would give a check for the amount that was represented by the draft drawn by the City National Bank on the First National Bank. If the cattle came first and were sold when the draft was presented, we paid it, if the draft came before the cattle were in the yards, they would hold the draft until the cattle were sold." (S. F. 294 26-7.) * * * A representative of the bank had been in our office or place of business the day these cattle arrived. He was a collector. He had been there at other previous times with reference to drafts on shipments. * * * He was there the day before this shipment came in; he did not ask anything about these cattle, I told him the cattle were not in yet. He was there the next day, the cattle were in the pens, and I told him the cattle were not sold. They were in the pens of the J. P. Peters Commission Company. I did not tell him they were in the pens of the J. P. Peters Commission Company. Nothing was said by him with reference to that matter. I suppose the cattle were sold in the course of a half hour after he left. These cattle were down there when the collector of the First National Bank of Kansas City, Missouri, came down and asked me about them the last time, and I told him they were in the pens. He gave me no instructions about how to handle them." (S. F. p. 25.)

The court will probably refuse to consider appellant's Ninth assignment of error for the reason that the statement thereunder does not show that any objection was made to the testimony complained of, nor refer to the transcript for any bill of exception to the testimony. However, if the court should consider this assignment, Appellees submit,

Appellees' Counter Proposition under Appellant's Ninth Assignment of Error.

It is not reversible error to admit objectionable testimony relating to the same matter and to the same effect is admitted without objection.

Statement.

Both of the witnesses, John Fox and E. F. Reese, whose evidence is quoted in its brief under said assignment, testified, 295 without objection, to practically the same facts that the witness Waite, testified to, there was no objection to the testimony of either of these witnesses. (See appellant's brief, page 110.)

Authorities.

G. H. & S. A. Ry. Co., v. Grenig, 142 S. W. 135;
Watt v. Spring Garden Ins. Co., 154 S. W. 658.

Appellant's Tenth and Eleventh Assignment of Error will be considered together.

Appellees' Counter Proposition under Appellant's Tenth and Eleventh Assignment of Error.

Where there is evidence sufficient to raise the issue, and the jury, being the exclusive judges of the weight to be given the testimony, decide the question, the court cannot disturb such finding.

Statement.

J. C. Wallwork, joint agent, testified:

"I know J. A. Peters. I have known him several years, every since he began shipping through the joint, either in 1910 or 1911. I recall a series of shipments by the City National Bank here to Kansas City, The First National Bank of Kansas City, along in October, 1911. I have no recollection of having a conversation with Mr. Peters concerning the shipment of October 27th, 1911, before it was made, but I have after it was made. I did have a conversation in regard to that last shipment. * * * The shipper does not sign the waybill, he has nothing to do with them. They are for the use of the railroad company. * * * Waybills should be made out in conformity with the bills of lading or shipping contracts, unless sometimes the contracts are made and then they come around and ask you to add something on there and in your hurry the billing clerk is liable to forget to put it on the other. That has been known in several cases. Of course it is an oversight of the railroad if they fail to put it on the contract. I was joint agent for the four lines here in El Paso, viz, The Sante Fe, the G. H. & S. A. Texas & Pacific and the E. P. & S. W. System. I did not see these bills of lading at the time they were issued. I did not talk to Mr. Peters at the time they were issued. I talked to him on several shipments. In this bill of lading, the consignor is the City National Bank and consignee First National Bank. Our waybills make them consignee, care J. P. Peters Commission Company. That is not on the bill of lading, that is an oversight." (S. F. pp. 38-40.)

J. F. Williams testified, "We were allowing Mr. J. A. Peters to bill them (the cattle) out for us and look after getting them up there, and we knew that somebody had to make some arrangements to get the money to pay for them after they got there. There was nobody else that went up there that was concerned about them except Mr.

Peters and the J. P. Peters Commission Company, except the bank was our agent."

J. A. Peters testified, "As to whether I directed the clerk of the railroad that issued the bill of lading to bill them that way, that is the billing I gave the clerk of the railroad that issued the bill of lading at the joint warehouse. * * * When I executed the contract I directed the agent how to bill. I directed him to bill care of the J. P. Peters Commission Company. * * * I do not remember if I took the contract under which these cattle moved after I had executed it. I might have taken the contract at that time, or they might have called a messenger and had it sent up to the bank; 297 we bill the cattle out, but we didn't get the contract until after the cattle are loaded so they can put the car numbers on them. (S. F. p. 29.)

Ed. W. Jarvis testified, "J. A. Peters issued the billing instructions on those cattle. His instructions were the cattle were billed from the City National Bank to the First National Bank of Kansas City, Missouri, care J. P. Peters Commission Company." (S. F. p. 35.)

Authorities.

H. & T. C. Ry. Co. v. Lee, 69 Tex., 556;

W. A. Leigh Piano Co. v. American Mult. Sales Co., 171 S. W. 494.

Argument.

See argument under counter proposition under Appellant's Fourteenth Assignment of Error.

Appellees' Counter Proposition under Appellant's Twelfth Assignment of Error.

Where there is evidence sufficient to raise the issue, and the jury, being exclusive judges of the weight to be given the testimony, decides the question, the court cannot disturb their finding.

Statement.

J. F. Williams, "We were allowing Mr. J. A. Peters to bill them out for us and look after getting them up there, and we knew that somebody had to make some arrangements to get the money 298 to pay for them after they got there. There was nobody that went up there that was concerned about them except Mr. Peters and the J. P. Peters Commission Company, except the bank was our agent." (S. F. p. 23.) "It was up to Mr. Peters to get the money and pay the bank or somebody. It was our understanding that Mr. Peters was to handle these cattle after they got to Kansas City and get the money and pay in the bank." (S. F. p. 22.)

John F. Waite testified, "In those instances in which the draft reached there before there was a sale, the draft had not been taken up and delivered before the cattle were delivered to the purchaser. * * * If the cattle came first and were sold, when the draft was presented we paid it, if the draft came before the cattle were in the yards they would hold the draft until the cattle were sold." (S. F. pp. 26-27.)

J. A. Peters testified, "I know why the cattle going to Kansas City were consigned to J. P. Peters Commission Company in this particular case; I might explain that better by illustration of one shipment that arrived there during the night in very poor condition, and billed to the bank, we could not get the cattle released until the bank opened in the morning and by the time we got back from the bank with the bill of lading it would be about 9:30, so that by the time we got possession of the cattle and fed and watered them, the day's market would be over." (S. F. pp. 30-31.)

See also paragraph 1, anti page- 4 to 7 this brief.

299 Appellees' Counter Proposition under Appellant's Thirteenth Assignment of Error.

Where from all the evidence and circumstance- of the case the jury makes a finding of fact under special issue submitted by the court, such finding will not be disturbed if there is evidence or circumstances to sustain such finding.

Statement.

J. P. Peters testified that in one of the earlier shipments the cattle arrived in Kansas City in the night. They were in poor condition; they could not be delivered by the carrier until the bank opened in morning. It was then too late to feed and water them and get them on the market for that day, and subsequent to that time they were waybilled care J. P. Peters Commission Company. (S. F. pp. 30-31)

Waite testified that when the draft came in before the cattle, the bank would hold the draft until the cattle were sold. (S. F. pp. 26-27.) See also paragraphs, 7, 8 and 9 anti pp. 7 to 10 this brief.

Argument.

The course of dealing between appellant and the J. P. Peters Commission Company for the period covering the large number of cattle shipments shown in this record, would lead the unbiased mind of any ordinary person to the conclusion that the City National Bank desired and had authorized the J. P. Peters Commission Company to take said cattle to Kansas City and sell them and get the money to pay off the debt which John T. Cameron owed the said bank. To

300 this end J. A. Peters was employed. Mr. Williams admits that J. A. Peters and the J. P. Peters Commission Company was expected to "handle" these cattle. He was "allowed" to bill them out. No one from the bank went to the railroad office to look after them. The Railroad Company, so far as the record shows, never saw any other representative of the bank than J. A. Peters. After his experience with having the cattle delayed on the tracks in the cars in Kansas City, waiting for the bank to open, he changed the billing so that it would not be necessary to encounter such delay another time. He shipped trainload after trainload of these cattle and they were delivered without reference to the bill — lading. No complaint had come to the railroad company from the bank, either at this end or the Kansas City end of the line. The receiving carrier knew J. A. Peters as the man fully and wholly in charge of the cattle. They knew no one else.

The delivering carrier, the agent of the receiving carrier, knew of the delay in Kansas City in the one instance of holding the cattle until a draft at the bank had to be taken up. After that time, the cattle were delivered immediately upon arrival into the pens of the J. P. Peters Commission Company. There was no delay. There was no complaint. J. A. Peters was still loading trainloads of cattle in El Paso and consigned them to his father's firm in Kansas City, the bank there was holding the drafts until the cattle were sold. The receiving carrier was relying fully and completely upon the authority of J. A. Peters. Its agents were so directing the shipments that his wishes could be respected. The only conclusion that
301 can be drawn from the circumstances and record of the whole case has been drawn by the jury, viz., that the First National Bank of Kansas City would never have held a single one of the drafts until the cattle were sold unless it had been instructed to do so by the City National Bank, and that it was entirely satisfactory to the consignor for J. A. Peters and the J. P. Peters Commission Company to "handle" these cattle to the best advantage and sell them on the first market and not have them held without feed and water until the bank opened in the morning after their arrival at destination, and that having received no complaint or notice to the contrary, the delivering carrier relied upon the acquiescence of the First National Bank, the "agent" of the consignor, City National Bank, in the whole arrangement as to the handling of the cattle and in their delivery to the J. P. Peters Commission Company prior to the payment of the drafts, and that in such reliance, the shipment in question was delivered.

Appellees' Counter Proposition under Appellant's Fourteenth
Assignment of Error.

Where the jury makes a finding on an issue submitted to it, and it appears that the evidence and circumstances of the whole case are sufficient to sustain such finding, the jury being the sole judge of the weight to be given such facts and circumstances, such finding will not be disturbed by the court.

Statement.

One of the earlier shipments was held by the delivering carrier until the bank opened and by reason thereof the cattle would not be placed on the market for that day. (Testimony of J. A. Peters, top page 31, S. F.) Subsequently the cattle were sent care J. P. Peters Commission Company, and, "If the cattle came first and were sold when the draft was presented, we paid it; if the draft came before the cattle were in the yards, they (the First National Bank of Kansas City) would hold the draft until the cattle were sold." (Testimony of John F. Waite, S. F. p. 27, top of page.) "All of the shipments were eventually handled by J. P. Peters Commission Company." (Testimony of J. F. Williams, near bottom of p. 21, S. F.) (See also paragraph- 7, 8 and 9, anti pp. 7 to 10 this brief.)

J. C. Wallwork testified that the direction, "Care of J. P. Peters Commission Company" was left off the bill of lading by mistake. (S. F. top p. 40.)

Argument.

From the evidence and circumstances in the case we get a mental picture of a train load of cattle in poor condition, which has been shipped from Old Mexico to Kansas City by Railroad, arriving at destination in the night time; J. A. Peters, who was "handling" them and "billing them out" for the consignor, anxiously endeavoring to get them unloaded and fed and watered for the market of the coming day; the delivering carrier refusing to deliver them to J. A. Peters or the J. P. Peters Commission Company, although Mr. Williams of the City National Bank, admits that there was no one else in Kansas City "that was concerned about them except Mr. Peters and the J. P. Peters Commission Company, except the bank was our agent" and that it was "up to Mr. Peters to get the money." Peters was helpless and the delivering carrier was powerless to deliver the cattle in accordance with the wishes of the only parties concerned," because that particular shipment of cattle had been billed to First National Bank, Kansas City, and that institution was closed until nine o'clock in the morning. In the light of human experience and circumstances and facts, there could be no other inference or conclusion, and the jury was justified and is fully sustained in its finding that the First National Bank, which was but the agent of the consignor, was thoroughly in accord with the wishes and purpose of J. A. Peters and his principal, the City National Bank, to have all subsequent shipments delivered immediately upon arrival at Kansas City. It would be inconceivable that an institution like the City National Bank of El Paso would so arrange its negotiations in regard to these numerous shipments of cattle that the First National Bank of Kansas City would refuse to cooperate with J. A. Peters and the J. P. Peters Commission Company

in getting the cattle on the first market possible after feed and rest in Kansas City. After this one wait for the bank to open the agents of the receiving carriers received instructions through the waybills to deliver to the First National Bank of Kansas City, care J. P. Peters Commission Company. This direction indicating to them that the First National Bank must have made some arrangements with its principal, the City National Bank, whereby a delivery to J. P. Peters Commission Company would be entirely satisfactory. Subsequent deliveries — so made and there was no complaint.

304 Answering the final argument of appellants under its several assignments of error, we wish to emphasize to the Appellate Court the situation that the carrier found itself in in regard to this shipment. A large number of trainloads of cattle had been tendered it for shipment by one J. A. Peters, who, apparently, was, and represented himself to be, the agent of the City National Bank for the purpose of making these shipments. He was the only man for the consignors that the carriers ever saw. He had handled a number of shipments, giving instructions with regard to the billing and waybilling, and no question had ever been raised as to his authority. It appears in the record, specifically, that the City National Bank, although its attorneys contend that Peters did not have authority, through its Vice President testifies that they allowed J. A. Peters to handle all the shipments and to bill them.

In this state of the record, J. A. Peters changes the original plan of billing and waybilling to the First National Bank, and directs the carrier to make the waybill in care of the Peters Commission Company. Strictly speaking, the bill of lading should also have been changed. The facts show, however, that it was the intention of Peters, as communicated to the carrier, to execute all of the documents so that a delivery to the Peters Commission Company would be justified. It is found by the jury that the phrase "care of Peters Commission Company" was omitted from the bill of lading by mutual mistake. If it had not delivered to J. P. Peters Commission Company and damage had resulted, it would unquestionably have been

sued by the City National Bank for its failure to deliver to
305 the Peters Commission Company, and their contention then would have been that J. A. Peters was their agent, and the carriers knew that he was their agent and that in omitting to follow his instructions, with regard to delivery, a liability has been incurred. The carrier does deliver to J. P. Peters Commission Company, and in all instances but one the City National Bank, which knew of such delivery, did not complain of same nor instruct the carrier differently. It is only in the one instance, where loss resulted, that they seek to hold the carrier liable. We think it must be clear to the mind of any fair man (as seems to have been to the jury) that to hold the carrier liable in this instance would be to perpetuate a very grave injustice.

Counsel for appellant, however, undertake, as we read their brief, on purely technical grounds to maintain a liability against the carrier. In examining this record, we find the fact to be that it was intended that the bill of lading should contain the phrase "care of

Peters Commission Company," and the jury had found, in response to special issues, that this phrase was omitted from the document itself by the mutual mistake of the parties. The inquiry then, before this court, is not what is the legal effect of the bill of lading as on its face it reads but what is the legal effect of the bill of lading with the omitted phrase inserted therein, because the jury had found that that was the intention of the parties and that all of them knew of it, or, in other words, the substantial effect of their findings is that, to the knowledge and with the approval of the City National Bank,

306 J. A. Peters, its duly authorized agent, directed the carrier to execute such documents and so handle the cattle as that they should be legally deliverable to the Peters Commission Company. This the carrier did, and the cattle were so delivered. Its only omission, if any, which was participated in by the plaintiff, being that, through inadvertance, the phrase "care of Peters Commission Company" was omitted from the bill of lading. In the absence of some question of notice and nothing of the kind appears in this record, the legal rules should be applied as though the bill of lading read "in care of Peters Commission Company." So construed, it is apparent that the plaintiff's whole case falls to the ground, and the law finds the same result that the jury found, and that any fair minded man must find, namely, that the plaintiff instructed the carrier to deliver the cattle to the Peters Commission Company and that the carrier followed instructions and did deliver them to the Peters Commission Company.

As stated before, any other result than an affirmance of the jury's verdict would perpetrate a very grave injustice upon an innocent carrier.

Appellees respectfully submit that the judgment of the Trial Court should be affirmed.

W. A. HAWKINS,
W. M. PETICOLAS,
DEL W. HARRINGTON,
Attorneys for Appellees.

Court of Civil Appeals El Paso, Texas, Filed Sep. 29, 1920.

J. I. DRISCOLL,
Clerk,

By E. J. REDDING,
Deputy.

307 *Judgment of the Court of Civil Appeals, October 28th, 1920*

No. 1116.

CITY NATIONAL BANK OF EL PASO, TEXAS, Appellant,

vs.

EL PASO & NORTHEASTERN RAILROAD COMPANY et al., Appellees.

Appeal from the District Court of El Paso County, Texas.

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed; that the appellees, El Paso & Southwestern Company, El Paso & Northeastern Railroad Company, El Paso & Rock Island Railway Company, Chicago, Rock Island & Gulf Railway Company, and Chicago, Rock Island & Pacific Railway Company, do have and recover of and from the appellant, City National Bank of El Paso, Texas, and its surities, J. F. Williams and W. Cooley, all costs in this behalf incurred, and this decision be certified below for observance.

Minute Book Volume Three at page 53.

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No. 1116.

CITY NATIONAL BANK OF EL PASO, TEXAS, Appellant,

vs.

EL PASO & NORTHEASTERN RAILWAY COMPANY et al., Appellees.

Appeal from the District Court of El Paso County, Texas.

Opinion.

The City National Bank of El Paso, Texas, appellant, brought this suit against the appellees, El Paso & Northeastern Railroad Company, and various other railroad companies, alleging that the defendants were railroad corporations engaged in business as common carriers, owning and operating a line of railroad extending from El Paso, Texas, to Kansas City, Missouri; that on October 27th, 1911, in consideration of the freight paid to the defendant, El Paso & Southwestern Company, the El Paso & Northeastern Railroad Company, for itself and its co-defendants, agreed in writing signed by the plaintiff and El Paso & Southwestern Company, to safely carry from El Paso to Kansas City, Missouri, and there deliver to the First National Bank of Kansas City, the consignee at said place, 847 head of cattle

309 of the value of \$20,000.00, the property of plaintiff, then and there at El Paso, in pursuance of said agreement, delivered to the El Paso & Northeastern Railroad Company, in pursuance of the agreement made by the El Paso & Southwestern Company, who then and there received and accepted the cattle upon the agreement, and for the purposes mentioned in behalf of the defendants; that defendants did not safely carry and deliver said cattle in pursuance of said agreement but so carelessly and negligently acted in regard to the same in their business as common carriers that the cattle were lost to the plaintiff and not delivered to the said consignee to the plaintiff's damage in the sum of \$10,101.18; that defendants have failed and refused and still fail and refuse to deliver the cattle to the First National Bank, consignee, in pursuance of said agreement, or to the plaintiff, and by reason of the carelessness and negligence of defendants the plaintiff has been damaged as aforesaid, for which judgment was prayed.

The answer of the defendant is quite lengthy and need not be stated at length. It is sufficient to say that among other defensive matters pleaded it was set up that the contract was in writing and was entered into by the plaintiff through its agent J. A. Peters, who instructed appellees to deliver the cattle at Kansas City to J. P. Peters Commission Company, which was done; that the order to so deliver the cattle was in fact a part of the transportation contract but the failure to endorse such order on the same was due to mutual mistake of the parties and that such delivery discharged them.

310 By a supplemental petition the plaintiff replied to certain defensive matter set up by the defendants, namely, the years statute of limitation, and a failure to give written notice of the damages within four months as provided by the bill of lading. In this supplemental petition it is again averred that the terminal carrier never in fact delivered the cattle to the plaintiff, the consignor, or to the First National Bank of Kansas City, or to any other person or corporation authorized by the consignor or consignee, by the terms of the contract to receive delivery.

By a trial amended petition it was averred that the defendants issued and delivered the bill of lading for the shipment without inserting therein that the consignee should be the First National Bank of Kansas City, Missouri, care J. P. Peters Commission Company, and that it was through negligence and fault of defendants in permitting the bill of lading to be so issued and delivered to the plaintiff herein without giving notice to it or advising it that there had been direction or instruction by J. A. Peters to bill or ship the cattle to the First National Bank, care of J. P. Peters Commission Company, and had said bill of lading contained said directions plaintiff would not have accepted same, but accepted the bill and relied therein without notice of said intention and had the bill contained the directions alleged to have been given by Peters, plaintiff would have notified the defendant not to deliver the cattle to the Peters Commission Company, and by reason of their conduct and act in

311 putting into circulation, issuing and delivering and permitting to be issued to plaintiff said bill of lading without said instructions (care of Peters & Company) thereon, the defendant was estopped to deny same, its effect or its validity, or to set up any undertaking or agreement with said J. A. Peters.

The case was tried before a jury and submitted upon special issues and upon the jury's findings judgment was rendered in favor of the defendants, from which the plaintiff prosecutes this appeal.

The record discloses that for some time prior to the date of the shipment in question John T. Comeron had been buying cattle in the interior of Mexico and shipping them to Juarez, Mexico, whence they were entered into the United States at El Paso.

According to the testimony of J. F. Williams, Vice-president of the plaintiff, Mr. Cameron would buy the cattle in Mexico with money furnished by a bank in Chihuahua. That bank would consign the cattle to the plaintiff with draft attached for the amount of the purchase price. After being cleared through the custom house and delivered to the plaintiff on the American side, plaintiff would then refund the purchase price to the Chihuahua Bank and take over the transaction from Cameron and ship the cattle to Kansas City for sale; that they had no arrangement for anyone to handle them in Kansas City; that J. A. Peters was an employee of Comeron and looked after the shipping of the cattle and billed them out under our instructions. Williams was the representative of the plaintiff in

312 handling the transactions relative to the Cameron cattle, and further testified that neither he nor anyone else from the bank looked after the shipments; that J. A. Peters looked after the shipments, or nearly all of them, and that he knew J. A. Peters was looking after the shipments; that they presumed he was shipping the cattle to Kansas City and that they were being handled there by the J. P. Peters Commission Company. He admitted that the bank was allowing J. A. Peters to bill the cattle out for it and look after getting the cattle to Kansas City. He testified that Peters brought him the bill of lading covering the shipment in question and it was attached to a draft drawn on the J. P. Peters Commission Company of Kansas City for the amount of the money advanced by the bank and that this draft and bill of lading was sent to the First National Bank of Kansas City with instructions to release the cattle to the Commission Company upon payment of the draft. The draft was never paid and the same together with the bill of lading was later returned to the plaintiff.

It was further shown by the evidence that the shipment in question was the last of the Comeron shipments and that prior to that time there had been eighteen or twenty train loads of the Cameron cattle which had been handled and shipped out by the plaintiff in the manner aforesaid, the transactions having extended over a period of several months. This last shipment of cattle was delivered by the terminal carrier to the J. P. Peters Commission Company at Kansas City, Missouri, without the surrender of the bill of lading.

313 The material portions of the bill of lading are as follows:

"Contract.

"Executed in Duplicate at El Paso, Texas, Station, October 27, 1911.

"This agreement made between the El Paso & Southwestern Company of the first part, and City National Bank of the second part.

"Witnesseth: That for the consideration and mutual covenants, and conditions herein contained, the said first party will transport for the said second party the livestock described below, and the parties in charge thereof, as hereinafter provided: 28 cars, said to contain 147 head of cattle, from El Paso, Texas, station to Tucumcari station, consigned to the First National Bank, Kansas City, Mo., at published tariff rates; said rate being less by virtue of the execution of this contract than rate for shipment transported without limitation of carrier's liability except at common law, and in consideration of said rate, and other considerations, it is mutually agreed between the parties hereto as follows:

In paragraph three of the bill of lading it was provided that the second party at his own risk and expense is to take care of, feed, water and attend to, said stock, etc., and holds first party harmless on account of any loss or damage to his said stock while being in his charge and attended by him or his agents or employees.

In paragraph five it was provided:

"That when first party shall furnish for the accommodation of second party laborers to assist in loading or unloading his stock, they shall be entirely subject to his orders." In paragraph six it was also recited: "That second party expressly agreed that as a condition precedent to his right to any damage to his said stock, second party will give notice in writing of its claim therefor, etc."

Eleventh. No person other than the owner of the stock shipped, or his duly authorized agent in the name of the owner, shall be allowed to sign this contract."

314 "Thirteenth. First party hereby admits that it has received at the station and on the date first above written, from second party, certain livestock as hereinbefore described, to be transported as aforesaid at the rate or rates, and subject to the rules and conditions hereinbefore and hereinafter referred to, and agrees that said livestock will be delivered as aforesaid unto second party or order, or assigns, or connecting lines if destined beyond, subject to the conditions hereinbefore and hereinafter expressed on the payment of transportation charges as agreed."

The contract was signed thus:

"J. C. Wallwork, Agent for the Company.

City National Bank, By J. A. Peters, Shipper."

The way-bills covering the shipment bore this notation.

"Name of Shipper:—City National Bank.

Name of Consignee:—First National Bank Kansas City, Mo., care J. P. Peters Commission Company, priv. St. Louis, Mo."

The way-bills accompanied the shipment and were for the information and guidance of the employees of the defendants in handling the shipment. The cattle were delivered by the terminal carrier to the J. P. Peters Commission Company upon the notations made upon the way-bills.

The issues submitted to the jury and answers thereto were as follows:

"Question Number One. Do you find from the evidence by preponderance thereof, that contemporaneous with, or just prior to the execution and delivery of the bill of lading covering the shipment of cattle in question in this suit, it was mutually agreed by and between J. A. Peters, acting for the City National Bank, and the agent of the receiving carrier at El Paso, Texas, that such cattle should be consigned by the bill of lading to the First National Bank of Kansas City, Missouri, care of the J. P. Peters Commission Company?"

Answer. Yes.

315 Question Number Two. Do you find from the evidence, by a preponderance thereof, that when the bill of lading covering the shipment of cattle in question was issued that the same, by the mutual mistake of J. A. Peters, acting on behalf of the City National Bank, and the said agent of the defendant carriers acting in their behalf, omitted to state in the bill of lading in accordance with their mutual agreement, that the cattle were consigned to the First National Bank care of the J. P. Peters Commission Company, if such agreement there was?

Answer. Yes.

Question Number Three. Do you find from the evidence, by a preponderance thereof, that J. A. Peters, directed the agent of the defendant carriers receiving the cattle at El Paso, shipment of which is in question, to place on the way-bill that the cattle were consigned to the First National Bank of Kansas City in care of the J. P. Peters Commission Company?

Answer. Yes.

Supplemental Question by Court. Was such direction on the part of J. A. Peters to said agent, if you have found he gave such direction, prior to, contemporaneous with, or subsequent to the execution and delivery of the bill of lading covering this shipment of cattle?

Answer. Contemporaneous with.

Question Number Four. Do you find from the evidence, by a preponderance thereof, that in the case of the shipments of cattle made prior to the shipment in question, said prior shipments consigned by bills of lading by the City National Bank of El Paso, Texas, to the First National Bank of Kansas City, that the delivering carrier delivered same to the J. P. Peters Commission Company at Kansas

City prior to the payment of the drafts drawn on the Peters Commission Company attached to the bills of lading?

Answer. Yes.

Question Number Five. Do you find from the evidence by a preponderance thereof, that in cases of prior shipments of cattle inquired about in question Number Four, that the said First
316 National Bank had notice prior to the arrival of the shipment in question herein, that the delivering carrier had delivered such prior shipments or some of same to the Peters Commission Company prior to the payment of the drafts drawn on said Peters Commission Company for such prior shipments, if any of them had been delivered prior to the payment of the drafts, and said bank ratified and acquiesced therein?

Answer. Yes.

Question Number Six. Do you find from the evidence, by a preponderance thereof, that in reliance upon the ratification or acquiescence of the First National Bank of Kansas City in the delivery of said prior shipments of cattle to J. P. Peters Commission Company before the payment of the drafts attached to the bills of lading, if said shipments had been delivered prior to the payment of the drafts, and said bank did ratify or acquiesce therein, that the delivering defendant delivered the shipment of cattle in question in this suit to the J. P. Peters Commission Company without the payment of the draft attached to the bill of lading?

Answer. Yes.

Question Number Seven. Do you find from the evidence, by a preponderance thereof, that the acquiescence or ratification of the First National Bank of the delivery of prior shipments before payment of the drafts attached to the bills of lading, if prior shipments were so delivered and the First National Bank acquiesced and ratified same, was reasonably sufficient to induce the belief on the part of the agent of delivering defendant carrier that said J. P. Peters Commission Company was duly authorized to receive said cattle for the First National Bank of Kansas City?

Answer. Yes.

Question Number Four Requested by Plaintiff. Do you find from the evidence, by a preponderance thereof, that had such bill of lading recited that the cattle were to be delivered to the First National Bank, care of the J. P. Peters Commission Company, that plaintiff could and would have notified the defendants, prior
317 to the delivery to the J. P. Peters Commission Company, not to deliver said cattle without the payment of the draft in the First National Bank of Kansas City?

Answer. No.

Jarvis, the bill clerk of the receiving carrier testified that J. A. Peters gave the bill of lading instructions on the cattle and that his instructions were that the cattle were billed from the City National Bank to the First National Bank of Kansas City, care of the J. P. Peters Commission Company, and that there had been previous shipments during the month on which Peters had given the billing instructions; that he wrote the way-bills to accompany the shipments

at the direction of J. A. Peters and that he was asked by Peters to way-bill the cattle to the First National Bank of Kansas City, care of the J. P. Peters Commission Company.

J. A. Peters testified:

"They came up here from Mexico, having been purchased by Mr. Cameron consigned to the City National Bank of this City. That is what I mean by "legal title," that they were consigned to the City National Bank here. When they reached El Paso they were handled in the Southwestern stockyards, fed, watered and entry made at this port. I took charge of them on behalf of the City National Bank when they reached here, and have them handled. They were handled in public stock yards, which serves the public generally. I took charge of them not only at the instance of the City National Bank but also of Mr. Cameron and the Peters Commission Company of Kansas City. I had charge of them down there in the stockyards. I do not know how long they remained there before being shipped out, it took two or three days to get them released and forwarded on. I signed all the contracts and looked after that, and all the shipments we had. I signed the livestock contract under which the cattle moved out of here as agent of the City National Bank. I signed it
318 City National Bank by J. A. Peters. I had been handling all of those shipments, this was one of numerous shipments. This is the contract which I executed, that bears date October 27th. These are the way-bills issued by the El Paso & Southwestern System, dated October 27th, 1911, under which the cattle in question moved. It appears in those way-bills that the cattle were consigned by the City National to the First National Bank of Kansas City, care of J. P. Peters Commission Company. I billed them that way. As to whether I directed the clerk of the railroad that issued the bill of lading to bill them that way, that is the billing I gave the clerk of the railroad, that issued the bill of lading at the joint warehouse. I think I gave the agent the directions, with reference to the shipment, at the same time the contract was executed. My recollection is so, undoubtedly so. When I executed the contract I directed the agent how to bill. I directed him to bill care of the J. P. Peters Commission Company. I don't remember exactly but I should judge that that was about the eighteenth or twentieth train of cattle that we had handled from Mexico consigned by the City National Bank to the First National Bank of Kansas City about that time. Practically all of those shipments were handled under the same agreement between Mr. Cameron and the City National Bank and myself. Those shipments were made before the shipment in question, right up to two or three or four trains a week, up to the time of this shipment. Prior to the date of this shipment I had been handling these eighteen or twenty shipments at the rate of about three or four trainloads a week. I do not remember if I took the contract under which these cattle moved after I had executed it; I might have taken the contract at that time, or they might have called a messenger, and had it sent up to the bank; we bill the cattle out, but we don't get the contract until after the cattle are loaded, so they can put the car numbers on them. It

was customary at that time, if I had time, I went down and got the duplicate contract myself, but if I was busy I sent a messenger. This contract was sent to the City National Bank and attached to draft on Peters Commission Company, Kansas City. After I had given directions about the way-bills and the contracts had gone to the bank, I signed the draft to which the duplicate contract was attached. I had nothing to do with it, after the cattle left town I had nothing further to do with it." * * *

319 "The first shipments of the eighteen or twenty were not consigned to the First National Bank care J. P. Peters Commission Company like this shipment was; I do not remember just how many were, but several shipments previous to this one were consigned the same way as this shipment. I know the reason why the cattle going to Kansas City were consigned to J. P. Peters Commission Company in this particular case; I might explain that better by an illustration of one shipment that arrived there during the night in very poor condition, and being billed to the Bank, we could not get the cattle released until the bank opened in the morning, and by the time we got back from the bank with the bill of lading, it would be about 9.30, so that by the time we got possession of the cattle and fed and watered them, the day's market would be over. That happened during the forepart of the shipments. Subsequent to that time the way-bills were changed so as to read them care of J. P. Peters Commission Company.

Cross-examination:

I do not remember that the City National Bank ever instructed me to bill these cattle in care of the Peters Commission Company. They never did that I remember of. I had no authority to sell the cattle without handling them for the City National Bank, we sold numerous shipments here." * * *

"I do not remember that the City National Bank authorized me to bill these cattle care of the Peters Commission Company instead of to the First National Bank of Kansas City. I do not remember of ever talking to them about it, or telling them that I had done it. I would not want to swear either way." * * *

"My interest in the cattle was merely an equity and the City National Bank had title and possession and claimed the cattle until their money was repaid to them, and it was the understanding that I had no right to release those cattle from the possession and ownership of the City National Bank by anything that I did until they were first paid for."

Other facts in the case will be indicated in the course of the opinion.

320 The assignments will not be considered in the order in which they are presented.

Under the tenth and eleventh assignments it is contended that the answers of the jury to question- one and two are contradictory to and unsupported by the evidence. The shipping clerk, Jarvis, testified

that Peters directed that the cat- be billed to the First National Bank care of the J. P. Peters Commission Company. J. A. Peters also testified that he directed the clerk how to bill the cattle and to bill them to Kansas City, consigned to the First National Bank, care of the J. P. Peters Commission Company.

J. A. Wallwork, the joint agent of the defendants testified that a bill of lading always precedes the way-bill and that the way-bills are made up from the bills of lading; that way-bills are for the information of the conductor of the train and accompany the shipments and the shipper has nothing to do with waybills; that while way-bills should be made out to conform to the bills of lading but sometimes the contracts are made up and the shipper comes around and asks you to add something and you put it on one and forget to put — on the other. Neither the shipping clerk, Jarvis, nor Peters explained why the bills of lading did not show that the cattle were shipped to the First National Bank, care of the J. P. Peters Commission Company but it clearly appears from the evidence indicated that instructions to that effect were given by Peters and that in billing the cattle the shipping clerk was governed by his instructions and should have made proper notation to that effect upon the bills of lading, but for some unexplained reason failed to do so but the inference is that both Peters and Jarvis mutually overlooked incorporating the full instruction in the bills of lading. Under the evidence indicated questions numbers one and two are amply supported by the evidence.

Under the twelfth, thirteenth and fourteenth assignments the sufficiency of the evidence to support the findings upon issues five, six and seven is questioned. There may be no direct evidence to support these findings, but in the light of all the facts and circumstances in the case the findings are supported, but under the view this court takes of the case these findings are noncontrolling and it is immaterial whether or not the evidence supports same.

The fourth assignment is to the effect that there was no evidence to show that J. A. Peters was authorized by plaintiff to ship or bill the cattle in care of the J. P. Peters Commission Company, and that the burden of proof was upon the defendants who are seeking to reform the contract to show that Peters was authorized by plaintiff to so bill the same and in the absence of such proof plaintiff is not bound thereby. In view of the failure of the plaintiff to deny under oath, the authority of Peters to execute the written contract in question it may be doubted whether the appellant is in a position to question his authority in the premises. Article 1906, Sub. Div. 8, R. S. But waiving this consideration, Peters clearly was acting within the apparent scope of his authority when he gave the billing directions in question and appellant therefore cannot avail itself of any secret limitation upon his authority. It is shown that there had been many preceding shipments of the Cameron cattle and that in most of these preceding shipments Peters had acted for the Bank in shipping and billing the cattle out. A shipper who intrusts to another authority to ship a commodity apparently confers upon him plenary power to give the

necessary billing instructions and unless the carrier has knowledge of some fact sufficient to put it upon notice of a limitation upon such apparent general authority of the shipping agent, such carrier is not bound by any secret limitation imposed by the shipper upon his agent. There is nothing to indicate that the receiving carrier in this case had any knowledge of any limitation upon the authority of Peters to give billing instructions, but apparently he had plenary power in this respect conferred upon him by the appellant and it is bound by the instructions which he gave.

Under the first and second assignments it is asserted that the court erred in refusing to give a peremptory instruction in favor of the plaintiff and that the court erred in rendering judgment in favor of the defendants because under the pleadings and bill of lading and the evidence and findings of the jury the defendants were not entitled to a verdict.

It is contended by the appellant that the thirteenth paragraph of the shipping contract constituted what is commonly known as an "order" bill of lading; that the bill of lading upon its face discloses that the plaintiff was the owner of the cattle and by the thirteenth paragraph reserved to itself the *jus disponendi* and defendants had not the right to deliver the cattle to any one but
323 the plaintiff or his order and upon production and surrender of the bill of lading properly endorsed and having failed to deliver to the plaintiff, or its order, and without surrender of the bill of lading the defendants are liable; that where a shipment is made upon a shipper's order bill of lading the carrier cannot excuse himself for misdelivery unless such misdelivery is due to the fault of the shipper. The appellant takes the position that an order bill of lading is radically different from what is commonly known as a "Straight" bill of lading and the rules of law applicable to order bills of lading are to be here applied. Numerous authorities are cited to the effect that a bill of lading containing provisions similar to that contained in the thirteenth paragraph, constitute an order bill of lading; that under such bills the *jus disponendi* is reserved to the shipper and that the carrier has no authority to deliver to anyone except the shipper or his order and upon surrender of the bill of lading properly endorsed. The correctness of the authorities cited is not questioned, but upon the issues presented by appellants pleading they have no application here. The substance of the plaintiff's petition has been indicated at some length and it predicated its cause of action upon a contract which is alleged bound the carriers to safely carry the cattle to Kansas City and there deliver the same to the First National Bank, and that defendants, had failed and refused to deliver to said Bank, or plaintiff or to any other person or corporation authorized by the consignor, or the consignee, by the terms of said contract to receive delivery.

324 If the contract be reformed so as to show that the cattle were billed to the First National Bank, care of the J. P. Peters Commission Company, then the allegations of the petition would fail for delivery to the Commission Company was shown. It has

been a number of times held that where goods are shipped to the consignee, care of another person, it is a sufficient delivery if made to the person in whose care the goods were so shipped.

Elliott on Railroads (2nd Ed.) Par. 1524a;

Ela vs. Express Co., 29 Wis. 611;

Russell vs. Livingston, 16 N. Y. 515;

Express Co. vs. Hammer (Ind.) 51 N. E. 953.

In this state it has been often held that the sending of a telegraphic message in care of a third person necessarily constitutes such third person the agent of the sendee with authority to receive the message and that delivery to the third person is sufficient.

Tel. Co. vs. Young, 77 Tex., 245;

Tel. Co. vs. Shaw, 90 S. W. 58.

There is no reason why the same rule should not apply to a contract of carriage.

Under the contract, as pleaded, the carriers were bound to carry the cattle to Kansas City and there deliver to the First National Bank and the cause of action is predicated upon the failure of the bank to deliver to such consignee or to plaintiff, or to any other person authorized to receive the same. Had the petition declared

325 upon a contract binding the carriers to transport and deliver to the shipper, or his order, the authorities and argument of the appellant would be applicable. Not having declared upon a shipper's order contract which reserves the right of disposition to the shipper, the plaintiff is not entitled to recover simply because his evidence shows a contract of that nature. Evidence however adduced without pleading to support it will not support a judgment.

Middlebrook vs. Zapp, 73 Tex., 29;

Jamison Gin Co. vs. Measels, 207 S. W. 365 and cases there cited.

Under the third assignment the proposition is advanced that the defendants were not entitled to reform the shipping contract so as to show a billing in care of the J. P. Peters Commission Company because the alleged mistake was caused by its negligence and for the further reason that mistake will not be relieved against and an instrument reformed where the opposing party can not be put in statu quo.

As to the negligence of the parties, it would seem that the Bank's agent, Peters, was equally at fault with the shipping clerk, Jarvis. The term "mistake" carries with it the idea of fault, but the mere fact that a mistake was made in an instrument does not show such negligence as to bar the right of reformation, for, if that were so, a court of equity could never interfere. In Kelly vs. Ward, 94 Tex. 289, this same contention was made and in thus disposing of the same, Justice Williams said:

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"Where both parties are thus mistaken as to the effect of the writing and ignorant of its misstatement of the agree-

ment, the failure of one to understand, through omission to read or give sufficient attention to its contents, can not avail as a defense to the other, equally in fault, against a suit to correct such mistake. Referring to this subject, the Court of Appeals of New York, in the first case above cited, says: 'Indeed, in most of the cases to be found in the books, where relief has been sought against written instruments on the ground of fraud and mistakes, the complaining parties were chargeable with the same kind of negligence which exists in this case, to-wit, the omission to read or understand the contents of instrument executed or accepted. It has certainly never been announced as the law in this State that the mere omission to read or know the contents of a written instrument should bar any relief by way of a reformation of the instrument on account of mistake or fraud. It is the general rule that where a written instrument fails to conform to the agreement between the parties in consequence of the mutual mistake of the parties however induced, or the mistake of one party and fraud of the other, a court will reform the instrument so as to make it conform to the actual agreement between the parties.' In most of the cases referred to, the provisions of the writings against which relief was sought were quite as plain as those of the instrument here involved.

"The mere fact, therefore, that Ward and his attorney failed to understand the writing according to its true legal effect, when the opposite party shared in the error, cannot be held by this court as legally precluding him from relief."

Upon the authority of that case and many others which might be cited, the contention of appellant that the right to reform the instrument is barred by the appellee's negligence is overruled. Neither is there any merit in the contention that the instrument should not be reformed, so as to show the true agreement and intention of the parties because the Bank can not be put in statu quo. It seems to us that there is nothing in this case to prevent the application of the well settled rule that a contract will be reformed so as to show the true agreement between the parties where, by mutual mistake, the contract as drawn fails to do so. The jury having found that the bill of lading by mutual mistake failed to show that the cattle were to be billed to the First National Bank, care of the J. P. Peters Commission Company, the court properly treated the contract as it should have been written.

Ross vs. Armstrong, 25 Texas, (Supp.) 368;

Kelly vs. Ward, supra.

The fifth assignment complains of the refusal to submit an issue requested by the appellant, as follows:

"Do you find from the evidence, by a preponderance thereof, that the plaintiff, City National Bank, on receipt of the bill of lading in question in this suit, relied on same as expressing the true contract between the parties, and were without notice that the way bill

directed that the cattle be delivered to the First National Bank care of J. P. Peters Commission Company?"

This issue was noncontrolling and had it been submitted and answered in favor of the appellant it would not have affected the rights of the defendants to a judgment under the pleadings, evidence and other findings of the jury.

The sixth, seventh and eighth assignments relate to the admission of evidence. The error, if any, in the admission of this testimony, was harmless and is not ground for reversal.

Under the ninth assignment error is also assigned to the admission of evidence to the effect that it was the general custom in Kansas City to handle and deliver cattle shipments on the way-bills. The proposition being that the position and unambiguous terms of the written contract as evidenced by the bill of lading cannot be controlled by a custom that varies therewith. This testimony was admissible for the purpose of showing that the cattle were handled in the manner that J. A. Peters, appellant's shipping agent, knew they would be handled and intended that they should be handled and in corroboration of the contention of the appellant that the true contract and agreement between the parties was to deliver these cattle to the J. P. Peters Commission Company, which direction was omitted from the bills of lading by the mutual mistake of the shipping agent, Peters, and the bill clerk of the receiving carrier. But if it be not admissible its erroneous admission presents no ground for reversal as the controlling facts in this case are that J. A. Peters, appellant's shipping agent, acted within the apparent scope of his authority in directing that the cattle be shipped in care of the J. P. Peters Commission Company; the further fact that by mutual mistake such direction was not incorporated in the shipping contract; the fact that the cattle were delivered to the Peters Commission Company and that plaintiff's cause of action is based upon a contract which, it was alleged, bound the carriers to deliver the cattle to the consignee.

Upon the views expressed all of the assignments of the appellant are overruled and the judgment affirmed.

E. F. HIGGINS,
Associate Justice.

Filed October 28, 1920, Court of Civil Appeals, El Paso, Texas.

J. I. DRISCOLL,
Clerk,

By E. J. REDDING,
Deputy.

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1620/1116.

In the Court of Civil Appeals for the Eight- Supreme Judicial District of Texas at El Paso, Texas.

No. 1116.

CITY NATIONAL BANK OF EL PASO, TEXAS, Appellant,

vs.

EL PASO & NORTHEASTERN RAILROAD COMPANY et al., Appellees.

Comes now the appellant in the above entitled and numbered cause and moves the Court to grant it a rehearing herein and to set aside the judgment affirming the judgment of the trial court, because of the following errors committed by this court in the decision of this case.

1. Because the Court erred in overruling Appellant's first assignment of error, wherein the following error was assigned:

"The court erred in failing to grant plaintiff's special question No. One requesting the court to instruct the jury to return a verdict in favor of plaintiff against the defendants the El Paso & Southwestern Railway Company, the El Paso & Northeastern Railway Company, and the Chicago, Rock Island & Pacific Railway Company for the amount sued upon, because under the bill of lading covering the shipment of cattle involved in this suit, as well as the undisputed evidence introduced in said cause, plaintiff was entitled to a judgment against said named defendants."

Statement.

See statement under Appellant's first assignment of error on pages 7 and 8 inclusive of its brief filed herein.

Authorities.

See authorities on pages 18 to 22 inclusive Appellant's brief.

Additional Authorities.

See also the case of Lee vs. Boutwell, 44 Texas, 151.

Argument under the Foregoing.

See Appellant's argument on pages 22 to 81 of appellant's brief filed herein. See also appellant's written argument on this motion for rehearing filed herein.

2. Because this Court erred in overruling appellant's first assignment of error for the reason that under Section 7 of the Act of the

United States Congress of June 29, 1906, known as the Carmack Amendment to the Hepburn Act, providing that any common carrier receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or any common carrier, etc., and the undisputed evidence having shown that the instant case was an interstate shipment and controlled by the aforesaid Act of Congress, and the undisputed evidence having shown that the bill of lading was issued by the receiving carrier to the plaintiff, who was the lawful holder of said bill of lading at the time the defendant delivered the cattle to the Peters Commission Company, the plaintiff was entitled to Judgment against the defendants, and this Court's decision in overruling Appellant's first assignment of error and in affirming the judgment of the trial court was contrary to and in conflict with the aforesaid Act of Congress.

Argument.

See argument under Appellant's first assignment of error in reference to this point on pages 78 to 81 inclusive of its brief; See also additional argument on this point in written argument on this motion for rehearing filed herein.

3. Because the Court erred in overruling Appellant's second assignment of error, as follows:

"The Court erred in rendering judgment in favor of the defendants because under the pleadings and the bill of lading introduced in said cause covering the shipment involved, and the evidence and the findings of the jury show that the defendants were not entitled to a verdict in their favor."

4. Because the court erred in overruling Appellant's third assignment of error as follows:

"Under the terms of the bill of lading, plaintiff was entitled to recover, and such bill of lading could not be altered or controlled by any instructions of the said Peters, the carrier's agent, and the plaintiff having accepted said bill of lading and relied thereon, the carrier is bound thereby, and the carrier is estopped, as a matter of law, from showing a contract at variance with the terms of said bill of lading."

Authorities.

See Authorities on pages 86 and 87 of Appellant's brief.

See also additional authorities as follows:

Jones vs. Flournoy, 37 S. W. 326;

332 Westchester Fire Insurance Company vs. Wagner, et al. 38 S. W. 214.

5. Because this Court erred in overruling Appellant's Fourth Assignment of Error, as follows:

"The court erred because there was no evidence showing or tending to show that J. A. Peters was authorized by plaintiff to ship or bill the cattle in care of the J. P. Peters Commission Company, and the burden being on defendants to show such authority, and having failed to make such proof, this plaintiff is not bound by such instructions of said J. A. Peters to the carrier's agent, and plaintiff and defendant are, therefore, bound by said contract and under the terms thereof plaintiff is entitled to judgment."

Argument.

See Appellant's argument under its fourth assignment of error in its brief, pages 96 to 99 inclusive, filed herein; see also written argument under this motion for rehearing filed herein.

6. Because the Court erred in overruling Appellant's Fifth Assignment of Error, as follows:

"The Court erred in refusing to give plaintiff's special instruction No. 3, as follows: 'Do you find from the evidence by a preponderance thereof, that the plaintiff, City National Bank, on receipt of the bill of lading in question in this suit, relied on same as expressing the true contract between the parties; and were without notice that the way bill directed that the cattle be delivered to the First National Bank care of J. P. Peters Commission Company? Answer Yes or No.'"

7. Because the Court erred in overruling Appellant's sixth assignment of error as follows:

"The court erred in hearing the evidence about the way bills, and the introduction of the same by the defendants over 333 the objection of the plaintiff, for the reason as then and there stated by the plaintiff, that the bill of lading introduced in evidence constituted the contract between the parties and controlled their rights, and the way bills, being executed solely by the carrier without the shipper joining therein and being for the guidance only of the carrier, were not binding on the shipper and could not control or in any way affect the bill of lading, which objection, as aforesaid, was overruled by the court."

Authorities.

In addition to the Authorities cited on page 103 of Appellant's Brief under the foregoing assignment, see also the following cases:

St. Louis S. W. Ry. Co. vs. Cates, 38 S. W. 649;

The Delaware vs. Oregon Iron Company, 20 L. E. 579;

Central Railroad Company vs. Hasselkus, 91 Ga. 384; 44

American State Reports, 37;

Cox vs. Peterson, 30 Ala. 608; 68 American Decisions, 145.

Argument.

See Argument Appellant's Brief pages 103 to 105; see also written argument under this motion for rehearing filed herein.

8. Because the Court erred in overruling Appellant's seventh assignment of error, as follows:

"The court erred in permitting the defendant, over the objections of the plaintiff, to allow the witness, J. A. Peters, to testify how he directed the agent of the carrier to way bill the cattle, for the reason that the bill of lading controlled and not the way bill, and because if there was a mutuality of mistake it was not shown that the plaintiff had knowledge of the mutuality of the mistake."

Authorities.

Hinckley vs. The New York Central and Hudson River Railroad Company, 56 N. Y. 429.

334 9. Because the Court erred in overruling the eighth assignment of error, as follows:

"The court erred in permitting the defendants' witness to testify over the objections of plaintiff as to other and different shipments and the manner in which such other and different shipments were handled, and the method said other shipments were handled; for the reason as thereupon urged by plaintiff's counsel that it was immaterial to the issues in this cause how any other shipments were handled and because custom could not vary the terms of the specific written contract."

10. Because the Court erred in overruling appellant's ninth assignment of error as follows:

"The court erred in permitting the defendants to prove, by their witness John F. Waite, that there was and had been a custom with reference to how these cattle were handled after they reached Kansas City, and whether or not they were handled on the way bill or otherwise, for the reason as then urged by counsel for the plaintiff, such custom was immaterial and could not control the specific contract entered into between the parties, and for the reason that it was not shown that plaintiff, or who was the shipper, had any knowledge of such custom."

Authorities.

See authorities on pages 110 and 111 Appellant's brief.

11. Because the court erred in overruling Appellant's tenth assignment of error, as follows:

"The answer of the jury of 'Yes' to Question No. 1 propounded by the Court is contrary to the manifest weight of the testimony and

unsupported by the evidence introduced in said cause, for the reason that all the evidence shows that contemporaneous with or just prior to the execution and delivery of the bill of lading covering the shipment of cattle, it was not mutually agreed between J. A. Peters, acting for plaintiff, and the agent of the receiving carrier, that such cattle be consigned by bill of lading to the First National Bank at Kansas City, Missouri, care of the J. P. Peters Commission Company."

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Statement.

In addition to the statement shown on pages 112 to 114 of appellant's brief, see the following statement from the witness of appellees, J. A. Peters:

"I do not remember if I took the contract under which these cattle moved after I executed it; I might have taken the contract at that time, or they might have called a messenger, and had it sent up to the bank; we bill the cattle out, but we don't get the contract until after the cattle are loaded, so they can put the car numbers on them. It was customary at that time, if I had time, I went down and got the duplicate contract myself, but if I was busy I sent a messenger. This contract was sent to the City National Bank and attached to draft drawn on Peters Commission Company, Kansas City. After I had given direction about the way bills and the contracts had gone to the bank I signed the draft to which the duplicate contract was attached." (S. F. 29.) * * * "The first shipment of the eighteen or twenty cars were not consigned to the First National Bank care J. P. Peters Commission Company like this shipment was. I do not remember just how many were, but several shipments previous to this one were consigned the same way as this shipment. I know the reason why the cattle going to Kansas City were consigned to J. P. Peters Commission Company in this particular case. I might explain that better by an illustration of one shipment that arrived there during the night in very poor condition, and being billed to the Bank we could not get the cattle released until the bank opened in the morning, and by the time we got back from the bank with the bill of lading, it would be about 9.30, so that by the time we got possession of the cattle and fed and watered them, the day's market would be over. That happened during the fore part of the shipments. Subsequent to that time the way bills were changed so as to send them care of J. P. Peters Commission Company." (S. F. pages 30-31.)

The Appellees' witness Ed. W. Jarvis, testified as follows:

"J. A. Peters signed the live stock contract on behalf of the City National Bank; he signed the City National Bank by himself, J. A. Peters. There had been previous shipments during the
336 month of October on which Mr. Peters had given me billing instructions. These fourteen documents on blue paper are way-bills issued on the El Paso & Southwestern System, under date

of October 4, 1911, (S. F. p. 35) from El Paso to Kansas City, Missouri; these shipments were delivered on Mexican Central transfers and shipments handled through the Joint Warehouse, and consigned to the First National Bank of Kansas City, Missouri, care J. P. Peters Commission Company. These shipments come in here consigned to the City National Bank from Mexico. We are supposed to show all that on the billing, this is a little different from the other." (S. F. 36.)

Then counsel for appellees introduced in evidence way-bills numbered 32 to 79 inclusive, (S. F. 36 and 37), and thereupon the witness Jarvis continued:

"This bunch of papers you hand me are live stock way-bills on the El Paso & Southwestern System, all dated October 13th, and October 23rd, 1911, billed from El Paso to Kansas City, Missouri, delivered on Mexican Central Transfers, information in consignor's column, billed to First National Bank of Kansas City, Missouri, care of J. P. Peters Commission Company."

Thereupon counsel for appellees introduced in evidence way-bills 80 to 137 inclusive. Thereupon the witness Jarvis continued:

"I wrote those way-bills at the direction of J. A. Peters; *that* ones that are billed from the City National Bank; those delivered on transfers were handled like regular freight from the joint warehouse on the transfer. I mean by that any freight moving from Mexico came through the transfer, and if charges are not paid at the border they go through and we re-bill it, I was asked by Mr. Peters to way-bill certain of these cattle to the First National Bank of Kansas City, Missouri, care J. P. Peters Commission Company. That applies to all of the shipments." (S. F. 37.)

337 The appellees' witness J. C. Wallwork, after reciting that he was joint agent at the Warehouse in El Paso in October, 1911, stated: (S. F. p. 38.)

"Way-bills are for carrying freight, for the enlightenment of the conductor, for the conductor to know what he has on his train. * * * They are for the use of the railroad company." (S. F. p. 39.)

See additional argument in Appellant's written argument on this motion for rehearing filed herein.

12. Because the court erred in overruling appellant's eleventh assignment of error, as follows:

"The answer of the jury of 'yes' to question No. 2 propounded by the court is contrary to the manifest weight of the testimony and unsupported by the evidence introduced in said cause, for the reason that all the evidence shows that when the bill of lading was issued that the same did not by mutual mistake of J. A. Peters and the

agent of the defendant carrier omit to state in the bill of lading in accordance with their mutual agreement, that the cattle were consigned to the First National Bank care of the J. P. Peters Commission Co."

Argument.

See written argument on Appellant's motion for rehearing filed herein.

13. Because the court erred in overruling appellant's twelfth assignment of error as follows:

"The answer 'yes' of the jury to Question No. 5 propounded by the court is contrary to the manifest weight of the testimony and unsupported by the evidence introduced in said cause, for the reason that there was no evidence showing or tending to show that the First National Bank had notice prior to the arrival of the shipment in question that the delivering carrier had delivered prior shipments, or some of them, to the Peters Commission Company prior to the payment of the drafts drawn on said Peters Commission Company for such prior shipments; or that said bank had ratified or acquiesced therein."

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Argument.

See written argument on Appellant's motion for rehearing filed herein.

14. Because the court erred in overruling appellant's thirteenth assignment of error as follows:

"The answer of the jury 'yes' to Question No. 6 propounded by the court is contrary to the manifest weight of the testimony and unsupported by the evidence introduced in said cause, for the reason that there was no evidence showing or tending to show that the delivering carrier delivered the cattle in question to the J. P. Peters Commission Company in reliance upon the ratification or acquiescence of the First National Bank of Kansas City in the delivery of said prior shipments of cattle to the J. P. Peters Commission Company before payment of drafts attached to bill of lading."

Argument.

See written argument on Appellant's motion for rehearing filed herein.

15. Because the court erred in overruling appellant's fourteenth assignment of error, as follows:

"The answer of the jury of 'Yes' to Question No. 7 propounded by the court is contrary to the manifest weight of the testimony, and unsupported by the evidence introduced in said cause, for the reason that there was no evidence showing or tending to show that the

ratification or acqui-s-ence of the First National Bank of the delivery of prior shipments before payment on drafts was reasonably sufficient to induce the belief on the part of the agent of the delivering carrier that the Peters Commission Company was duly authorized to receive said cattle for the First National Bank of Kansas City, Missouri."

Argument.

See written argument on Appellant's motion for rehearing filed herein.

339 16. The court erred in affirming the judgment of the lower court denying plaintiff, the lawful holder of the bill of lading in question, to recover, because under the pleadings and the undisputed evidence the case at bar involved an interstate shipment and is governed by the Carmack Amendment to the Federal Statutes, which provides:

"Any common carrier receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier." (34th Statutes at L. 595, Chapter 3951, Compiled Statutes 1913, Article 8592.)

the result of which statutory enactment renders absolutely the written contract issued by the carrier the sole and only contract permissible under the law, and any verbal contract or any verbal modification of said contract is in contravention of said Federal Law, inadmissible to control the terms of said contract, and the court erred in permitting said written contract to be reformed by including therein the alleged verbal directions about the delivery of the cattle.

Authorities.

Carmack Amendment to the Federal Statutes, 34th Statutes at Law, 595, Chapter 3951, Compiled Statutes 1913, Article 8592.

Missouri, K. & T. R. R. Co. vs. Ward, 61 L. Ed. 1213;

Same case reported in the 169 S. W. 1035;

Pa. Ry. Co. vs. Olivet Bros. 61 L. E. 574;

A. T. & S. F. Ry. Co. vs. Robinson, 58 L. E. 901;

Ga. F. & A. R. Co. vs. Blish Milling Company, 60 L. E. 951;

340 Texas & Pacific Ry. Co. vs. Leatherwood, 63 L. E. 1096;

Adams Express Co. vs. Croniger, 57 L. E. 314;

St. Louis, I. M. & S. R. Co. vs. Starbird, 61 L. E. 917;

17. The Court erred in affirming the judgment of the trial court because in rendering the decision in this case this Court of Civil Appeals holds differently from a prior decision of another Court of Civil Appeals upon the material questions of law involved herein. Said decision with which the decision of this court conflicts is that of

Jones vs. Flournoy, et als., 37 S. W. 236, decided by the Court of Civil Appeals at San Antonio.

18. This Honorable Court erred in its decision in considering and approving the findings of the jury bearing upon the plea for reformation of the written bill of lading, in that the rule requiring a plea for reformation of a written contract to be established by evidence in the clearest and most satisfactory manner, was not applied, and said findings were not established in the clearest and most satisfactory manner.

19. This Court erred in affirming the findings of the jury on Questions One and Two wherein it was established by said findings by only a preponderance of the evidence that there was an agreement to include in the bill of lading "Care of J. P. Peters Commission Company" and that said agreement was omitted by mutual mistake of the parties, and that this Court did not apply the fundamental rule of law that before a written instrument can be reformed the evidence must establish the facts in the clearest and most satisfactory manner; but on the contrary this Court concluded and held that under the evidence Questions One and Two were amply supported by the evidence, which under the law should have been sustained by evidence of the clearest and most satisfactory sort.

Wherefore, the premises considered, Appellant respectfully submits that this Court has erred in rendering judgment affirming the judgment of the lower court.

That the attorneys for the Appellees are W. A. Hawkins, W. M. Peticolas and Del W. Harrington, and that El Paso County, Texas, is the residence and business address of each of the counsel for Appellees.

Respectfully submitted,

(Signed)

DYER, CROOM & JONES,
Attorneys for Appellant.

Endorsed: In the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas, at El Paso, Texas. City National Bank of El Paso, Texas, Appellant, vs. El Paso & Northeastern Railroad Company, et als., Appellees. Appellant's motion for rehearing. Filed Nov. 11, 1920. Court of Civil Appeals, El Paso, Texas. J. I. Driscoll, Clerk.

342 In the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas, at El Paso, Texas.

No. 1116.

CITY NATIONAL BANK OF EL PASO, TEXAS, Appellant,

vs.

EL PASO & NORTHEASTERN RAILROAD CO. et als., Appellees.

Appellant's Written Argument in Support of Its Motion for Rehearing Filed Herein.

Appellant desires to call the Court's attention to its failure to pass upon the issues presented under its first assignment of error, to the effect that this case should be controlled by the Carmack Amendment to the Hepburn Act, the Federal Statute enacted by Congress June 29, 1906. This law was in effect when the shipment in question originated and it will be presumed that the contracting parties contracted with reference to such law, the shipment being an interstate shipment, and insofar as Congress has undertaken to regulate the subject, the Federal enactments should and do control. This act

343 provides that any common carrier receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier. (Federal Statutes Annotated, Suppl. 1909, page 273.) It was alleged by the defendants that this was an interstate shipment. It is not denied that appellant was the lawful holder of the bill of lading at the time the cattle were delivered by the appellees to the J. P. Peters Commission Company. This case, therefore, clearly comes within the provisions of such law. Except in defiance to such law and contrary to its expressed mandates, the appellees could not deliver said cattle to anyone than the lawful holder of the bill of lading, without incurring liability to the lawful holder for any loss, damage or injury caused by it. This was held by the Washington Supreme Court in the case of Coovert et al. vs. Spokane P. & S. Ry. Co. 141 Pac. 324, fully set forth on pages 79-80-81 of Appellant's Brief. See also the case of Pa. Ry. Co. vs. Olivet Bros. 61 L. E. 908, where the court stated:

"The crucial words are 'Lawful holder.'" The defendant in said case having contended that the words "Lawful holder" meant "the owner or someone shown to be duly authorized to act for him in a way that would render any judgment recovered in such an action against the carrier res adjudicata in any other action." The court disapproved this contention and held that the Statute meant that the lawful holder of the bill of lading is the person to whom the carrier shall be liable for any loss, damage or injury to property caused by it.

344 The Supreme Court also held in the case of Adams Express Company vs. Croniger, 57 L. E. 319, that the significant and dominating features of the Carmack Amendment were:

"First. It affirmatively requires the initial carrier to issue 'a receipt or bill of lading therefor, when it receives 'property for transportation from a point in one state to a point in another.'

Second. Such initial carrier is made 'liable to the lawful holder thereof for any loss, damage or injury to such property caused by it.'

Third. It is also made liable for any loss, damage, or injury to such property caused by 'any common carrier, railroad or transportation company to which such property may be delivered, or over whose line or lines such property may pass.'

Fourth. It affirmatively declares that 'no contract receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed.' "

In the case at bar, when the court refused to recognize Plaintiff's claim as the lawful holder of the bill of lading, and the liability of the carriers for damages caused to the said plaintiff, the holdings of the trial court and of this court are repugnant to said Federal Statutes.

This court further erred in affirming the judgment of the lower court wherein a verbal modification of the written contract between the carrier and the plaintiff was upheld. The Carmack Amendment provides that the contract shall be in writing. No verbal contract, since the enactment of said law, is permissible. It was so held in the

345 case of Johnson vs. Missouri Pac. Ry. Co. et al. Kansas City, Missouri, Court of Appeals, 187 S. W. 283. Also by the same court in the case of Thee vs. Wabash Ry. Co. 217 S. W. 566, wherein it was stated:

"The verbal agreement for shipment, as pleaded, was illegal under the Carmack Amendment to the Interstate Commerce Statute. * * * The receipt or bill of lading (the written contract in this case) was issued. That written contract must govern this shipment to the exclusion of any oral contract."

To the same effect is the decision of the U. S. Supreme Court in the case of A. T. & S. F. Ry. Co. vs. Robinson, 58 L. E. 901:

If, then, no verbal contract is allowable due to the Federal Statute, no verbal modification will be permitted. In the instant case the carrier and the plaintiff entered into the written contract, as required by the Federal law, and both are bound thereby *are* estopped from disputing or varying its terms, and neither will be permitted to enlarge thereon by any terms, and neither will be permitted to enlarge thereon by any alleged verbal understanding in conflict therewith. The same rule should apply to reform the written contract because in this instance the court by its decree of reformation declares the contract different from that actually written and executed and

attempts to effectuate contractual relations at variance with the written contract. This is prohibited by the Carmack Amendment.

Again, inasmuch as a compliance with the federal law, as required thereby, a written contract shall issue and be executed such contract is determinative of the right and liabilities of the parties
346 to the exclusion of any other contract, written or verbal. Such was the holding in the case of Texas & P. R. Co. vs. Leatherwood, appealed to the U. S. Supreme Court from Court of Civil Appeals, Texas, 63 L. E. 1096, where the carrier sought to have the case controlled by the bill of lading issued by the intermediate carrier. The court said:

"The parties to a bill of lading cannot waive its terms, nor can the carrier by its conduct give the shipper a right to ignore them. A different view would antagonize the plain policy of the act, and open the door to the very abuses at which the act was aimed. The bill of lading given by the initial carrier embodies the contract for transportation from point of origin to destination; and its terms in respect to conditions of liability are binding upon the shipper and upon all connecting carriers, just as a rate properly filed by the initial carrier is binding upon them. Each has in effect the force of a statute, of which all affected must take notice."

This position was affirmed in the case of Missouri, K. & T. Ry. Co. vs. Ward, 61 L. E. 1213, wherein it is stated:

"The bill of lading required to be issued by the initial carrier upon an interstate shipment governs the entire transportation. The terms of the original bill of lading were not altered by the second, issue by the connecting carrier. As appellants were already bound to transport the cattle at the rate and upon the terms named in the original bill of lading, the acceptance by the shipper in the original bill of lading, the acceptance by the shipper of the second bill was without consideration and was void."

On this theory of the case we conclude and respectfully submit to this court for its earnest consideration, that the effect of the Carmack Amendment upon the case at bar, is three-fold: First: It renders the carrier liable to the plaintiff, the lawful holder of the bill of lading. Second: It prohibits varying said contract by verbal
347 testimony or the enlargement of the same, through a decree of reformation. Third: That the contract as issued absolutely governs the entire transaction and transportation.

Discussing the issues in the order of this Court's opinion, it is submitted that this court erred in analysing the evidence relative to Question- One and Two, for the reason that the instructions from the said Peters to Jarvis, Billing Clerk, pertains only and solely to the billing in the way-bills, and said instructions were not intended to and did not apply to the bills of lading. We submit that this Court in that part of its decision as follows: "Jarvis, the bill clerk of the receiving carrier, testified that J. A. Peters gave the bill of lading instructions on the cattle," is a misconception of the testimony,

because said Jarvis testified to instructions as to way-bills but did not give any evidence of any instructions from Peters to him regarding including in the bills of lading "care of J. P. Peters Commission Company." A careful reading of the testimony will also show that Peters did not give any instructions to Jarvis to include in the bills of lading, "Care of J. P. Peters Commission Company," and that Peters' instructions were meant to and did apply only to the way-bills.

Before undertaking a complete analysis of the testimony of J. A. Peters and Jarvis, the only two witnesses giving evidence on the issues presented by Questions One and Two, we desire to withdraw the following statement in Appellant's brief, contained on page 123: "While it is true that Peters testified that he directed the clerk to issue the bill of lading care of J. P. Peters Commission Com-
348 pany" because said Peters did not testify that he directed the clerk to issue the bill of lading care of J. P. Peters Commission Company.

Being confident that there is no evidence of any instructions from Peters to Jarvis to include in any of the bills of lading instructions Care of J. P. Peters Commission Company, it is our purpose to submit at length in this written argument the testimony bearing on said issues.

It was proved by the witness- Waite, Fox and Reese for the defendants that it was customary to make deliveries of cattle in Kansas City on the way-bills, that the railroads in fact paid no attention to the bills of lading. Peters stated:

"I know the reason why the cattle going to Kansas City were consigned to J. P. Peters Commission Company in this particular case. I might explain that better by illustration of one shipment that arrived there during the night in very poor condition, and being billed to the bank, we could not get the cattle released until the bank opened in the morning, and by the time we got back from the bank with the bill of lading, it would be about 9:30, so that by the time we got possession of the cattle and fed and watered them, the day's market would be over. That happened during the forepart of the shipments. Subsequent to that time the way-bills were changed so as to send them care of J. P. Peters Commission Company. (S. F. 31).

Thereafter, analyzing the statement just quoted as coming from Peters, he stated that he knew the reason why the cattle going to Kansas City were consigned to the J. P. Peters Commission Company in this particular case. The undisputed evidence showed that the bill of lading consigned the cattle to the First National Bank without the "in care J. P. Peters Commission Company" being mentioned. The undisputed evidence showed that the
349 way-bills in this particular case consigned them to the First National Bank in care of J. P. Peters Commission Company, and that the way-bills were the only bills mentioning the J. P. Peters Commission Company. It is, therefore, apparent, that when Peters

stated that he knew why the cattle were consigned to the J. P. Peters Commission Company in this particular case, he had reference to the way-bills and did not have reference to the bills of lading. It had also been shown by the witnesses for the defendants that deliveries were made on way-bills, and if deliveries were being made on way-bills and nothing was said concerning consigning them to the P. P. Peters Commission Company, the railroads would not deliver them to the J. P. Peters Commission Company. Therefore, in order, to obtain the cattle at an early time and before the bank was opened, Peters consigned them in care J. P. Peters Commission Company; that is he had the way-bills to so consign them.

This analysis and conclusion is reinforced by Peters' statement above quoted from as follows: "Subsequent to that time the way-bills were changed so as to send them care of J. P. Peters Commission Company." Nothing will be found in the record showing that the bills of lading were changed so as to send them that way, or that any shipping directions were given to change the bills of lading accordingly, but that the way-bills were the only bills that were changed.

350 On page 28 is the first testimony of Peters regarding contracts and instructions therein contained, as follows:

"I signed all the contracts and looked after that, and all the shipments we had. I signed the livestock contract under which the cattle moved out of here as agent of the City National Bank. I signed it City National Bank by J. A. Peters. I had been handling all of those shipments. (S. F. p. 28.) This was one of numerous shipments. This is the contract which I executed, that bears date October 27th. These are the way-bills issued by the El Paso & Southwestern System, dated October 27, 1911, under which the cattle in question moved. It appears in those way-bills that the cattle were consigned by the City National Bank to the First National Bank of Kansas City, care of J. P. Peters Commission Company. I billed them that way. As to whether I directed the clerk of the railroad that issued the bill of lading to bill them that way, that is the billing I gave the clerk of the railroad, that issued the bill of lading at the joint warehouse. I think I gave the agent the directions, with reference to the shipment, at the same time the contract was executed. My recollection is so, undoubtedly so. When I executed the contract I directed the agent how to bill. I directed him to bill care of the J. P. Peters Commission Company. I don't remember exactly but I should judge that was about the eighteenth or twentieth train of cattle that we had handled from Mexico consigned by the City National Bank to the First National Bank of Kansas City about that time."

Now, analysing the above testimony which we have just quoted as coming from Peters, it will be first observed that Peters was testifying to and had identified the contract of date October 27th. This was the bill of lading. Then he identified and testified about the way-bills dated October 27, 1911, "under which the cattle in

question moved." He stated: "It appears in those way-bills that the cattle were consigned by the City National Bank to the
351 First National Bank of Kansas City, care of J. P. Peters Commission Company. I billed them that way." He was unquestionably referring to and discussing the consigning in the way-bills and did not intend to testify as to the bill of lading. He said he billed them that way, referring to the way-bills. Immediately after saying that he billed them that way in the way-bills, he continued:

"As to whether I directed the clerk of the railroad that issued the bill of lading to bill them that way, that is the billing I gave the clerk of the railroad, that issued the bill of lading at the joint warehouse. I think I gave the agent the directions, with reference to the shipment, at the same time the contract was executed."

This last statement does not show that Peters gave the billing directions for their inclusion and insertion in the bills of lading, but merely stated the time he gave the directions for the billing, which directions were given at the time he executed the contract, at which time he, the said Peters, directed the agent how to bill.

A little later down on page 29 Statement of Fact, Peters said:

"I do not remember if I took the contract under which these cattle moved after I had executed it; I might have taken the contract at that time, or they might have called a messenger and had it sent up to the bank. We bill the cattle out, but we don't get the contract until after the cattle are loaded, so they can put the car numbers on them."

This statement likewise shows that he was testifying of way-billing the cattle out, because he states he bills the cattle out but he does not get the contract until the cattle are loaded. In other words, he gave the shipping directions on the cattle, which shipping direc-
352 tions were put into the way-bills, and then he would receive his contract. This conclusion is further verified because in the next breath, and on page 29 Statement of Facts, he says: "After I had given directions about the way-bills and the contracts had gone to the bank I signed the draft to which the duplicate contract was attached." He here again refers to giving directions about the way-bills but he does not mention giving any directions about the contracts, plainly showing that he was again testifying regarding his directions for the way-bills.

On the bottom of page 30, he stated:

"The first shipments of the eighteen or twenty cars were not consigned to the First National Bank care J. P. Peters Commission Company like this shipment was. I do not remember just how many were, but several shipments previous to this one were consigned the same way as this shipment."

To show that he was not testifying concerning the bills of lading, the bills of lading which Peters had just identified showed that they were consigned to the First National Bank without the "care J. P. Peters Commission Company." The way-bills about which he had just been testifying showed that this shipment, the present shipment, were consigned in said way-bills to the First National Bank care J. P. Peters Commission Company. Therefore, when he said the first shipments were not consigned to the First National Bank care J. P. Peters Commission Company like this shipment was, he had reference to and was talking about the way-bills and the consignment of the way-bills.

We submit that the above quotations from the evidence of J. A. Peters constitutes all the evidence he gave regarding directions to the billing clerk for the way-bills and for the bills of lading. Said quotations also include all evidence given by Peters on Questions One and Two; that is the alleged mutual agreement and the alleged mutual mistake. We call the Court's attention to the fact that Peters several times stated positively that he gave directions about the way-bills, but we further direct the court's attention to the record as being absolutely silent as regards any statements by Peters to the effect that he gave any directions for the bill of lading, other than the bills of lading that were issued and received.

The other witness testifying on these questions was Jarvis, the Billing Clerk. He begins his reference to the bills of lading and way-bills as follows:

"This is a livestock contract of the El Paso & Southwestern System, with the City National Bank as consignor and the First National Bank of Kansas City as Consignee. The Pink paper is a duplicate or carbon copy of the original. The white paper is the original."

Then counsel for the defense introduced and read in evidence the original and duplicate contract under which the shipment of cattle in question moved. We direct the Court's attention to the fact that no evidence was then given by the said Jarvis as to any instructions after identifying the contracts and introducing them in evidence, counsel for the carriers gave proof through Jarvis of the way-bills as follows:

"These twenty-eight sheets are El Paso & Southwestern way-bills, covering shipments of cattle from El Paso, Texas, to Kansas City, Missouri, from the City National Bank, consigned to First National Bank of Kansas City, Missouri, care of J. P. Peters Commission Company, privilege St. Louis, Missouri, dated October 27th, 1911."

354 Here counsel for defendants introduced and read in evidence said way-bills, marking same Exhibits 4 to 31 inclusive. Then and not until then did the said Jarvis mention billing instructions, though he had theretofore been interrogated about and had given evidence concerning the bills of lading. And after

identifying twenty-eight way-bills and in which he stated showed shipments of cattle consigned to the First National Bank, care J. P. Peters Commission Company, he continued as follows:

"J. A. Peters issued the billing instructions on those cattle. His instructions were the cattle were billed from the City National Bank to the First National Bank of Kansas City, Missouri, care J. P. Peters Commission Company."

Peters gave this testimony immediately following his identification of and testimony concerning the way-bills, and if any connection of his thoughts from the terms he used, can be arrived at from the manner of his testimony, it would seem that he had reference to billing instructions on the way-bills. Inasmuch as way-bills were for the guidance of conductors and were in fact billing instructions, it is but natural that both Peters and Jarvis had reference to way-bills when they mentioned billing instructions.

After giving the testimony last above quoted, Jarvis continued:

"J. A. Peters signed the live stock contract on behalf of the City National Bank; he signed the City National Bank by himself, J. A. Peters."

355 When mentioning the live stock contract we do not find that Jarvis mentioned any billing instructions on said contract. Then he continued:

"There had been previous shipments during the month of October on which Mr. Peters had given me billing instructions. These fourteen documents on blue paper are way-bills issued on the El Paso & Southwestern System under date of October 4, 1911, (S. F. p. 35) from El Paso to Kansas City, Missouri. These shipments were delivered on Mexican Central transfers and shipments handled through the Joint Warehouse, and consigned to the First National Bank of Kansas City, Missouri, care J. P. Peters Commission Company. These shipments came in here consigned to the City National Bank from Mexico; we are supposed to show that on the billing, this is a little different from the other." (S. F. p. 36).

Here counsel for the defendants introduced and read in evidence way-bills 32 to 45 inclusive; then way-bills 46 to 55 inclusive; then way-bills 57 to 67 inclusive; then way-bills 68 to 79 inclusive; clearly showing that Jarvis had testified concerning way-bills and way-bills only. Then beginning on top page 37 Statement of Facts, said Jarvis stated:

"This bunch of papers you hand me are live-stock way-bills on the El Paso & Southwestern System, all dated October 13th and October 23rd, 1911, billed from El Paso to Kansas City, Missouri, delivered on Mexican Central Transfers, information in consignor's column, billed to First National Bank of Kansas City, Missouri, care J. P. Peters Commission Company."

Then counsel for Defendant introduced and read in evidence way-bills 80 to 137 inclusive. Then the said Jarvis continued:

I wrote those way-bills at the direction of J. A. Peters; that ones that are billed from the City National Bank; those delivered on transfers were handled like regular freight from the joint
356 warehouse on the transfer. I mean by that any freight moving from Mexico came through the transfer, and if charges are not paid at the border they go on through and we re-bill it. I was asked by Mr. Peters to way-bill certain of these cattle to the First National Bank of Kansas City, Missouri, care J. P. Peters Commission Company. That applies to all of the shipments.

Was not the said Jarvis referring to way-bills when he gave the testimony just quoted? He mentioned specifically that he wrote the way-bills at the direction of J. A. Peters, and that he was asked by Peters to way-bill certain of the cattle to the First National Bank care J. P. Peters Commission Company. We find, therefore, positively, billing and shipping instructions from Peters to Jarvis to be put in the way-bills, but we have searched in vain to find any testimony from Jarvis or Peters about instructing Jarvis to put billing instructions in the bills of lading, care J. P. Peters Commission Company. We believe when this Court stated on page 7 of its opinion "that Jarvis testified that J. A. Peters gave the bill of lading instructions on the cattle, and that his instructions were that the cattle were billed from the City National Bank to the First National Bank in care J. P. Peters Commission Company," that this Court had not correctly analyzed the testimony of the said Jarvis.

We are further confident of our deductions from the evidence of Peters and Jarvis of the well-known fact that the carriers delivered the cattle in Kansas City on the way-bills, and that Peters knew of this custom of the carriers. This conclusion is also rendered impregnable because of the physical expressions of the intentions of Jarvis and Peters. They expressed their intentions
357 according to our analysis of the evidence, because Peters stated that he gave Jarvis instructions to way-bill the cattle care the J. P. Peters Commission Company, and Jarvis said he received such instructions. The physical written evidence introduced by the defendants showed that 137 way-bills were written according to these directions, and that each of the 137 contained billing instructions in the way-bills. "Care J. P. Peters Commission Company." That the said Peters and Jarvis did not testify to directions for bills of lading is as conclusively proven by the written bills of lading, which in all the shipments omitted the directions. If 137 way-bills included the directions, and some 12 or 15 or 18, the number not being exact from the record, of the bills of lading all omitted the directions, do not the physical facts as expressed in the written evidence of the directions and understandings of the parties, bear out our deductions and analysis of the statements of Peters and Jarvis? We contend, therefore, that there is no evidence to show any mutual agreement that any bill of lading should provide "Care J. P. Peters Commission

Company." No bill of lading did in fact have such provision in it. Peters gave directions as regards the way-bills, and all of the 137 way-bills fully complied with said directions, they having inserted therein "Care J. P. Peters Commission Company." It was established by our Supreme Court in the case of Waco Tap R. R. Co. vs. Shirley, 45 Texas, 377, that he "who seeks to rectify an instrument, on the ground of mistake, but must be able to prove not only that there has been a mistake, but must be able to show exactly
358 and precisely the form to which the deed ought to be brought, in order that it may be set right according to what was really intended, and must be able to establish, in the clearest and most satisfactory manner, that the alleged intention of the parties to which he desires to make it conformable, continued concurrently to the minds of all parties down to the time of its execution. The evidence must be such as to leave no fair and reasonable doubt upon the mind that the deed does not embody the final intention of the parties."

While we do not yield from our conclusion heretofore given that there is no evidence that there was an agreement that the bill of lading should have provided "Care J. P. Peters Commission Company," our position is stronger when we say the evidence in this case does not meet the extra burden placed upon the appellees, who sought relief from the rule given by the Supreme Court in the Shirley case, just above quoted from. Such rule is a salutary one. It is and would be deemed unjust to allow a written contract to be set aside or overthrown by verbal testimony. Ample illustration of the unjustness that can come from that kind of testimony is presented in the case at bar. The only two witnesses to the contract in controversy were the witnesses of the defendants, and no doubt friendly to the issues made by the defendants, upon whom was placed the burden of establishing the alleged mutual agreement and mutual mistake. This Honorable Court in its decision as regards Questions One and Two concluded that under the evidence they are
359 amply supported by the evidence. We submit this is not the rule in a suit for reformation of a written contract. The defendants should have established their facts "in the clearest and most satisfactory manner."

Again, a mistake will not be relieved against except where it is mutual between the contracting parties. As a basis for reformation it must always be alleged and proven by the party seeking to reform that the contract does not speak the true agreement of the parties, and that such condition exists because of the mutual mistake of the parties or the fraud of the adverse party. No question of fraud is involved herein. Therefore, the case simply resolves into the issue as to whether or not there was any evidence showing a mutual mistake. In answering Question No. 2 it was found the bill of lading, through the mutual mistake of Peters and the Agent of the carriers, omitted to state that the cattle were consigned to the First National Bank, care J. P. Peters Commission Company. Let it be admitted for the sake of presenting the issues determined in answering Question No. 2, that Peters had prior to or contemporaneous with the

execution of the bill of lading, instructed the agent of the carrier to include therein "Care J. P. Peters Commission Company." Assuming that such occurred, this of itself, or when considered in the light of the facts involved in the transaction, does not show a mutual mistake because Peters did not make the mistake and Peters did not prepare the bill of lading. Let it be assumed that Jarvis, Billing Clerk, omitted, through mistake, to insert in the bill of lading the directions given to him by Peters. The mistake of Jarvis, 360 who prepared the bill of lading, will not constitute a mutual mistake as the ground for a reformation of the instrument, unless he acted for both parties.

Benn vs. Pritchett, Missouri Supreme Court, 63 S. W. 1103.

The same court considered this statement of the law again in the case of Stephens vs. Stephens, 183 S. W. 573, as follows:

"Where the contract actually made by the parties, to a deed is not expressed in the instrument, by mutual mistake, equity will reform the deed and write in it by decree the contract which it should have contained, but only upon evidence so clear and convicting as to leave no reasonable doubt either of the mistake or its mutuality. Nothing less will justify the alteration of a written conveyance. In such cases, if the mistake was caused by the act of the draughtsman, it must further be established that he was the agent of both parties; otherwise, there would be no proof of its mutuality, and that indispensable fact would have to be shown by other evidence.

We submit there is no evidence to the effect that Jarvis was acting as the agent of the plaintiff in preparing and executing the bill of lading. We further contend that there is no evidence that Peters took any part in the preparation of the bills of lading, than to give the directions to Jarvis, and that there is further no evidence to be found anywhere in the record showing that Peters was mistaken about any bill of lading or any of its terms, and according to the above authorities, the mistake that was made by Jarvis is not chargeable to the plaintiff, because he is not the agent of the plaintiff, and the evidence in this case is wholly lacking in the essential element of mutuality.

We again refer the court to the statements and arguments we presented under our Twelfth, Thirteenth and Fourteenth 361 Assignments of Error, in which the sufficiency of the evidence to support the findings on issues 5, 6 and 7 is questioned. We submit that there was neither direct or indirect evidence to support those findings, but on the contrary, as regards Question 5, John F. Waite, who was manager of the Peters Commission Company, and who was the only witness testifying regarding said question said: "The collector of the First National Bank did not know of the delivery of the previous shipments, nor did the Bank." This shows that the defendants not only failed to meet the burden placed upon them, but proved by their own witness the absence of such knowledge by the Bank. We also submit that Questions 6 and 7 are not supported by any evidence, and that before said findings are affirmed by

the Appellate Court it should be satisfied by affirmative proof in the record of the evidence supporting the same.

Referring to that part of the Court's opinion in which the Court overrules the fourth Assignment to the effect that there was no evidence to show that J. A. Peters was authorized by plaintiff to ship or bill the cattle in care of the J. P. Peters Commission Company, we submit that this assignment is not controlled by nor is it in any respect limited by Article 1906, Subdivision 8, Revised Statutes, requiring a denial under oath in the answer of the authority of the agent to execute a written contract sued upon. It is true the Statute requires a verified answer denying the authority when one seeks to defeat a written instrument because of the lack of authority of

an alleged agent. In the case at bar this Statute is not applicable because the City National Bank has not denied and does not want to deny the authority of Peters to execute the written contract in question. It is a different situation, however, and one not calling for the influence of the Statute, where the carrier seeks to reform the instrument and include therein the verbal testimony at variance therewith. The statement sought to be put into the bill of lading, and which the Bank denied Peters had the authority to make, were verbal statements and were not part of the contract. We also think there is a distinction between the ostensible authority of an agent to execute a contract for the principal where the contract is the subject matter of the suit and the authority of an agent to include in a contract that which is not included and which is the subject matter of reformation; that in the latter case unless the agent had the authority to make the statements sought to be ingrafted on the written agreement, the principal is not bound, though the principal would be bound by the agreement as written: In other words, if the agent did not have authority in the beginning to make the statement sought to be reformed, the principal is not bound in the absence of proof of the agent's authority. This is the law given in Volume 23, Ruling Case Law, Section 20, page 328, under the subject: "Reformation of Instruments," in which it is stated:

"If one party is represented by an agent, it is necessary to show that he had authority to make the stipulations of the agreement which are alleged to have been omitted."

We respectfully suggest that this Court erred in its decision wherein it is stated that upon the issues presented by Appellants in their first and second assignments of error, the same were not supported by the pleadings and have no application here. We direct the Court's attention to the prayer for general relief, and further direct the Court's attention to the fact that the appellant introduced in evidence without objection from said defendants, the bill of lading. Under the affirmative allegations of plaintiff's petition and under the evidence, that is the bill of lading, and the admission that a delivery was made to the Peters Commission Company, together with the prayer for general relief, were sufficient to authorize a judgment in favor of plaintiff, notwithstanding it was pleaded as

a conclusion of law that the carrier breached its duty by not delivering to the First National Bank. As stated in the case of *Lee vs. Boutwell*, 44 Texas, 152:

"Where the plaintiff has prayed for general relief he may recover whatever the facts alleged and proved will entitle him to, although he may have prayed for a special relief, for which the facts of his petition, as alleged do not constitute an appropriate predicate."

It would seem the policy of the law to mete out justice to all and render its judgment according to the facts and equities involved, and where a plaintiff has declared upon a certain contract and said contract is introduced in evidence, without objection, and it is admitted that a delivery was made to another than authorized by the contract the plaintiff otherwise entitled to recover should not be deprived of this valuable right because of the mistake in the pleading of a legal conclusion or pleading the liability of the carrier or pleading the proper construction of the bill of lading. We submit, therefore, that under the issues presented by appellant and the
364 broad system of pleading permitted under our Statutes, and in view of the prayer for general relief and the undisputed evidence and the authorities cited in appellant's brief under its first and second assignments of error, which are not questioned by the appellees or this Court, the plaintiff was entitled to a peremptory instruction.

Adverting to that part of the Court's opinion to the effect: "As to the negligence of the parties, it would seem that the Bank's agent, Peters, was equally at fault with the shipping clerk, Jarvis," we submit that the decision of this Honorable Court is in conflict with the decision of this question by the Court of Civil Appeals at San Antonio in the case of *Jones vs. Flournoy*, 37 S. W. 236. The facts there and the relative position occupied by the various parties are very similar to those here, and the parts played by Peters and Jarvis in the instant case. In the *Jones vs. Flournoy* case, appellant had prepared and executed a deed conveying property. The grantor sought to reform the instrument by the addition of further conditions, as such further conditions were omitted by a mutual mistake. The court, speaking through Justice James, stated:

"Assuming that the testimony may be taken as sufficient to show that there was a previous understanding as claimed by appellant, we conclude that it is not shown that the omission to embody same in the deed was occasioned by fraud on the part of the appellees' agents or any other person. We further find in this connection on the issue of mistake, that the evidence established the fact that the mistake, if any, in not inserting the provision, was solely that of appellant, uninfluenced by appellees or any other person, and not a case of mutual mistake. The preparation of the deed was not
365 participated in by appellees. Appellant, before signing, required the addition of a clause relative to the use of the block for depot purposes, which was added in his own words; and, if the deed thereby failed to express the real understanding of the

parties on the subject, it was the result of his own act and want of ordinary care. These are all the conclusions necessary, in our judgment, to dispose of the case."

Further on the court stated:

"It was essential for appellant to show the existence of the alleged agreement. Assuming that the evidence is sufficient in this respect, appellant has not brought his case within the conditions entitling him to have the deed modified. No fraud whatever is shown in connection with the transaction itself, or in the preparation of the instrument. The deed was drawn and signed with apparent deliberation on the part of appellant, and was held by a committee of citizens of Beeville, of which appellant was one, for several months before delivery to the railroad company; the latter not being present or acting in the matter at any time. The very subject of the alleged mistake was considered by appellant when he signed the deed, and the clause now attempted to be supplanted and reformed was added by him. It appears to us that the mistake, if any, was unilateral, and of a character that equity will not relieve against.

We respectfully submit that in deciding the above case there *was* presented issues as nearly similar to the one now under consideration as can usually be found in reported cases. In the Jones case the grantor, who had prepared the deed, attempted to reform the same and had therein a clause which he said through a mutual mistake was omitted therefrom. The grantee did not prepare the deed but received and accepted same as prepared by the grantor. Now comparing that case with this one we find the bill of lading prepared by the appellees' agent, signed by all parties, and delivered to and received and accepted by the Plaintiff Bank without any knowledge on its part of any omission therefrom; but through
366 their own act; that is the act of their agent, Jarvis, the omission occurred, and the carrier seeks to reform said instrument so as to include such omission. We adhere to and again respectfully urge that Peters, the agent of the plaintiff, in the preparation of the bill of lading, played no part, nor influenced or caused in any way the omission from the bill of lading. That if said omission occurred it was due solely to the fault and act and want of ordinary care on the part of the carrier's agent. And as concluded by Judge James in the Jones case—if the bill of lading failed to express the real understanding of the parties it was the result of the carrier's own act and want of ordinary care.

Stripping this case of excess verbiage and the immaterial points, in its last analysis we find the rational deductions from the evidence show that Peters entered into the contract with the carriers for the plaintiff Bank, consigning the cattle in the bill of lading to the First National Bank at Kansas City, and at the same time and concurrent therewith instructing the agent of the carrier to way-bill them care the J. P. Peters Commission Company, for the purpose of obtaining a delivery without the necessity of producing the bills of lading or paying the drafts. We believe this position is sup-

ported by the undisputed facts. The case, therefore resolves itself into a question of law as to whether or not oral directions given to the carrier by the shipper in conflict with the bill of lading, will control or supersede the bill of lading, or whether the written contract is a final expression of the intention of the parties that will overcome any verbal directions contrary thereto. The well known rule of evidence applicable to all written contracts, preventing the introduction of oral testimony to vary or contradict written instruments, is controlling here. It is contended by counsel for appellee in their brief that a delivery was made according to the directions of Peters. Such directions, however, were verbal and in conflict with the contract of affreightment. The contract should and does control.

We ask the court's indulgence for submitting the seemingly lengthy written argument but have deemed it necessary and advisable; especially in view of the fact that we earnestly believe the Court has not properly analyzed the facts in the case—especially the testimony of Peters and Jarvis.

Respectfully submitted,

(Signed)

DYER, CROOM & JONES,
Attorneys for Appellant.

Endorsed: In the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas, at El Paso, Texas. City National Bank of El Paso, Texas, Appellant vs. El Paso & Northeastern Railroad Company, et al., Appellees. Appellant's Written Argument in support of its motion for Rehearing. Filed Nov. 11, 1920. Court of Civil Appeals, El Paso, Texas. J. I. Driscoll, Clerk.

368 In the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas, at El Paso, Texas.

No. 1116.

CITY NATIONAL BANK OF EL PASO, TEXAS, Appellant,

vs.

EL PASO & NORTHEASTERN RAILROAD CO. et als., Appellee.

Answer to Appellant's Motion for Rehearing and Argument Thereon.

Appellant again strenuously urges the theory that under the Carmack Amendment, delivery could only be made upon production of the bill of lading, and suggests that the Court has not passed upon that question.

It occurs to Appellee that the Court has, and did, pass upon that question and did so correctly. The Carmack Amendment is sub-

stantially to the effect that the carrier shall issue a bill of lading and shall be liable to the lawful holder for any damage, loss or injury, caused by it, or any connecting carrier.

369 The question in this case, as the suit is brought, is not a question of who is the proper party plaintiff, but a question of whether or not the carrier caused any loss. The answer is "No."

The City National Bank caused the loss, by directing the carrier (through its agent Peters) to deliver the cattle to the Peters Commission Company.

Appellant's contention, of course, is that in saying "shall be liable to the lawful holder" the Carmack Amendment by implication prevents a delivery to any one except the lawful holder of the bill of lading, and the question now to be determined is whether this is rigidly to be implied from the Carmack Amendment. As touching this question we quote from the case of Cincinnati Railway v. Rankin, 241 U. S. 327, where, in a shipment case, Justice McReynolds said:

"The rights and liabilities of the parties depend upon the acts of Congress, the bill of lading, and the common law rules, as applied in Federal Courts."

We also take leave to call the court's attention to what is held in some of the decisions cited by Appellant. *M. K. & T. v. Ward*, 244 U. S. 386, simply holds that in an interstate shipment, the contract with the initial carrier takes precedence and controls as against the contract of the connecting carriers. *T. & P. v. Leatherwood*, 250 U. S. 481, simply holds that the first contract embodies the contract for transportation, and its terms in respect to conditions of liability can not be varied by succeeding contracts.

370 *Adams v. Croniger*, 226 U. S. 507 holds that the liability to the lawful holder is not a liability of an insurer, but only the common law liability; and, further that a limitation fairly based on tariff and schedules is valid.

Atchison v. Robinson, 233 U. S. 173, merely holds that an oral contract cannot be allowed, when in conflict with the tariff and schedules.

To follow the discussion a little further, the Texas Court in *Gulf, Colorado & Santa Fe v. Vosbinder*, 172 S. W. 763, held that only the oral contracts condemned by the Supreme Court are those in contravention of the tariffs. (NOTE.—A writ of error was granted in this case that was subsequently refused, and it is chiefly of interest as disclosing what the United States Supreme Court cases have held.)

In *Pecos & North Texas v. Meyer*, 155 S. W. 312, writ of error denied, the Texas court held that the term "lawful holder" embraced the owner of the property transported, or any one beneficially entitled.

It has also been held that the consignor, though not the lawful holder of the bill of lading, can bring an action for loss. *Aultman vs. Coast Lines*, 71 So. 284; *Bowden v. Railway Co.*, 94 Atl. 209.

The purpose of calling the Court's attention to these cases is to show that the implication from the Carmack Amendment for which Appellant contends, namely, that delivery could only be made upon surrender of the bill of lading, is not a rigid implication, and while

371 there may be cases in which that implication would be applied, still, the general principles of the common law as said by the Supreme Court obtained, and the implicated rule is only applied subject to the relative rights, liabilities and duties of the parties as governed by the facts and the form of the action brought.

The Coovert case, upon which Appellant relies, is a perfect illustration of this. In that case, delivery was made to the consignee, after the railroad had been notified by the consignor that the bill of lading had been returned to it, and after it had surrendered the bill of lading to the railroad and demanded the goods, clearly, of course, a wrongful delivery.

The Nebraska Meal Mills v. St. Louis & Southwestern Railway, reported in the 41st S. W. Reporter, Page 810, is almost identical with the case at bar, and is illustrative of the contention which we make; namely, that Appellant cannot, by his own wrongful actions, induce us to make a given delivery, and then standing upon a rigid technical rule, ask the Court to overlook its wrong actions, and to award damages against the carrier for the very delivery which it directed.

In the Nebraska Meal Mills case, above cited, that corporation delivered to the Missouri & Pacific a car load of meal for shipment to E. D. Russell in Arkansas. A bill of lading was issued in which it was stipulated that the meal was to be transported to destination and there delivered to the consignee, Russell. The appellant, without notice to the railroad, drew a sight draft on Russell for the price of the meal, attached it to the bill of lading, forwarded it to a bank for collection. The bank presented the draft for payment, but Rus-

372 sell was insolvent and failed to pay. The connecting carrier, having no notice that a draft had been drawn on Russell, or that Russell was insolvent, or that the consignor desired to retain control of the meal until the draft was paid, delivered the meal without requiring the production of the bill of lading.

In that particular case the Court quotes the bill of lading as having been "straight" but to our minds it was no more a straight bill of lading than the one in this case is. That is to say, an order bill of lading, in the common acceptance of the term, would read "City National Bank, consignor, to order of City Bank, consignee, notify Peters Commission Company."

The instant bill of lading named the First National Bank of Kansas City, as consignee, and as the jury found the facts, the bill of lading must be considered as reading, "Consignee, First National Bank, care J. P. Peters Commission Company."

In Arkansas there was a statute providing that any and all persons, to whom the bills of lading may be transferred, shall be deemed and held to be the owners of the goods, and no property specified in such bills of lading shall be delivered except on surrender and cancellation of the bills of lading.

The Court said: "If, as counsel for appellant contends, the bill of lading represented the meal and the ownership of the meal was in appellant so long as it held the bill of lading, still, as such owner, it unconditionally directed the carrier to deliver the meal to Russell.

373 It would seem unreasonable to believe that the Legislature intended to impose a liability upon the carrier in favor of the consignor for acting and carrying out the directions of such consignor in regard to the delivery of the consigned property, for such contention would be contrary to common principles of reason and justice.

It has been repeatedly held that although the shipper's agent had really no authority to limit the value of a shipment, yet, if by his principal, he was placed in charge of the shipment, the carrier could rely upon his instructions and the principal would be bound thereby. *American Brake Shoe Co. v. Marquette Railway*, 223 Federal, 1018; *G. N. Railway v. O'Connor*, 232 U. S. 508.

Parenthetically, it may be said that independent of the question of mutual mistake, hereinafter adverted to, Appellees' counsel has always believed that when Appellant's agent directed the carrier to deliver to Peters Commission Company, the Appellant could never recover in this case.

The above discussion we think shows that the purpose of the Carmack Amendment was to make the initial carrier liable for loss, caused by it, and also for loss caused by its connecting carriers. For this purpose, it was provided, that a bill of lading should be issued by the initial carrier and it should be liable to the lawful holder; but this liability is the common law liability, subject to all the rules and restrictions of the common law, see *Collins vs. D. & R. G. Ry. Co.* 167 S. W. 1179; and there was no intention by Congress, by the use of the words, "Lawful holder" to make the statute an instrument of injustice; or, as where, in the instant case, the plaintiff
374 itself had specifically directed and caused the delivery to be made as made, that standing on the rigid technical implication from the words "Lawful holder," the appellant might take advantage of its own wrong, and cast an innocent party in damages.

We have indulged in the above discussion because we thought it might be of interest to the court, and possibly might tend to educate Appellant to realize that its loss was caused by the directing of its agent, to deliver to the Commission Company, and not by any negligence, misfeasance or nonfeasance of the Appellees.

As a matter of fact, the rule for which Appellant contends, namely, that delivery could only be made upon surrender of the bill of lading has no application to this case. This for the reason that Appellant is bound by its pleadings. It could only recover as it has plead and upon the cause of action asserted by it.

Appellant alleged a breach of an agreement to deliver to the First National Bank of Kansas City, the consignee named in the bill of lading.

The jury has found that the delivery could lawfully be made care Peters Commission Company, so that Appellant's cause of action, as plead by it, has failed; the delivery to the Commission Company being in view of the jury's finding a delivery to the First National Bank.

Appellant now relies upon a new cause of action for delivery without surrender of the bill of lading.

375 The plaintiff alleged that defendants agreed in writing to carry from El Paso, Texas, to Kansas City, and there deliver to First National Bank of Kansas City * * * that the defendant did not carry and deliver said cattle, but so negligently acted as that the cattle * * * were not delivered to said consignee. (Tr. 1-2-3.)

As said by this Court, in its opinion, the cause of action is predicated upon the failure of the carrier to deliver to such consignee, or to plaintiff, or to any other person, authorized to receive the same.

Although it is an elementary rule of law that the plaintiff can only recover in accordance with his pleadings we cite the following cases as supporting that proposition:

Galm v. Wabash Railroad Company, 87 S. W. Reporter, 1015, which holds that if the pleader alleges specific actions of negligence he must prove the acts alleged, else he will fail in his action.

Chitty v. St. Louis Iron Mountain & Southern Railway 49 S. W. Reporter, 870. In this case the petition alleged that the plaintiff was a passenger in the caboose of the train and was injured by being thrown out of the door. It was held that he could not recover by showing that he had reasonable cause to apprehend collision and jumped out of the door.

Norton v. G. H. & S. A. Railway Company, 108 S. W. Reporter, 1045. The character of an action is fixed by the allegations in the pleadings and not by facts subsequently disclosed by the evidence; where plaintiff seeks to recover on the ground that the rails

376 had not been properly spiked to the ties he cannot recover on other grounds.

G. C. & S. F. Railway v. McKinnell, 173 S. W. 937. The object of pleading is to appraise the Court and the opposite party of the facts upon which the pleader relies as constituting his cause of action; and neither party can be held legally bound to answer grounds not averred in the pleading.

To the same effect, Lemon v. Hanley, 28 Tex. 221.

We think it is clear, therefore, that Appellant's reliance upon the rule that the bill of lading, as an order bill, carries the title to the goods, comes too late. The action as brought by it was not founded upon delivery without surrender of the bill of lading, but was a straight suit, to recover against us for failure to deliver to the First National Bank.

All of the authorities cited by Appellant on this subject will be found to contain the saying "unless the misdelivery be caused by the failure of the shipper."

The case of Lee v. Boutwell, in the 44th Texas, Page 151, does not all sustain Appellant's proposition. In that case, plaintiff and defendant entered into a verbal contract. The plaintiff was to take charge of a stock of horses for the defendant, for which he was to receive every fourth colt. He alleged that the defendant took the horses out of his possession and prevented his performance of the contract. He did not sue for the profits he might have made, but sued for the expense that he had been put to in preparing to carry

377 out the contract. As he alleged it, he proved it, and it was only in the prayer that he had sufficiently pleaded, and this the court held the prayer for general relief corrected.

This brings us to the question of whether J. A. Peters was the agent of the City Bank, to handle and ship these cattle. Reference is made in this connection to the cases cited above, *American Brake Shoe Co. v. Marquette Railway*, 223 Federal, 1018; *G. N. Railway Co. v. O'Connor*, 232 U. S. 508.

If he was, then the case is but simple, and all of the Appellant's laborious and ingenious theories fall to the ground, and we have simply an instance where the City National Bank, desiring to ship cattle to Kansas City, first consigned them to the Kansas City Bank, but finding that it might in that way lose a day's market—as it did in one instance (S. F. 31)—it directed the carrier, thereafter, to so ship them as that they should be delivered "Care Peters Commission Company" intending thereby that the cattle should be so billed as that they would be delivered to the Peters Commission Company.

Having done this and having made a loss through the failure of the Commission Company to account for this shipment, the City Bank now seeks to shift that loss to the carrier, by taking the position that the Carmack Amendment and authorities in general make the Carrier liable to the holder of the bill of lading, and take the position that the City Bank, being the holder, it can recover of the carrier notwithstanding the fact that it (through its agent) directed the

378 carrier to deliver the cattle to the Peters Commission Company. Having obtained the true basis of the relative rights and liabilities of the parties, let us first inquire:

Was J. A. Peters the agent of the City Bank to ship the cattle?

The outstanding feature of this question is contained in the testimony of J. F. Williams, Vice President of the City Bank, as follows:

"I did not personally go down to the railroad office to ship them. No one from the Bank personally went and looked after that."

"There had been quite a number of these shipments prior to this particular one, and Mr. Peters had looked after all, or nearly all, of them. I knew that he had been looking after the shipments. We knew that these cattle were being handled (at Kansas City) by the J. P. Peters Commission Company (S. F. 17-24). We were allowing Mr. J. A. Peters to bill them out for us and look after getting them up there."

Without reference, at this point, to the further testimony in the case of J. A. Peters and the defendant's agents, we have now the facts: (a) that the bank knew that somebody had to go to the railroad office and make the shipping arrangements; (b) that the bank allowed J. A. Peters to do this and that he knew he was doing it; (c) that nobody else from the bank went to the railroad office or had anything to do with making the actual billing arrangements.

Thus Peters became the agent of the Bank, with plenary power to ship the cattle as and to whom he saw fit. No secret limitation of his authority, if such there were, would affect or bind the carrier. He was the only man the carrier knew, the only man the carrier saw—his directions were to deliver the cattle to the Peters Commission Company, and this the carrier did, nor can the City Bank take advantage of any form of contract, in any event, because the delivery to Peters Commission Company was caused (even if contra-y to its own wishes) by the action of the City Bank, in vesting J. A. Peters with plenary power to handle and ship the cattle as he saw fit.

In this Connection it is to be remembered that there has been other shipments that had been handled as this one was, and had been delivered to Peters Commission Company and that the jury in answer to Question Five, found that in these prior shipments the cattle had been delivered to Peters Commission Company prior to the payment of the drafts, and that the City Bank knew of this and ratified and acquiesced therein, and that in answer to Question Four, requested by plaintiff, the jury found that had the bill of lading actually consigned the cattle to First National Bank, care Peters Commission Company, the City Bank would not have notified the defendant not to deliver until the draft was paid.

We come now to the evidence of mutual mistake, a great deal of which is also relevant as showing what Peters' instructions to the carrier and authority from the City Bank were.

In analyzing this testimony we must also bear in mind that we are not (as does the Appellant) simply arguing what the testimony does or does not show, but we are to determine as *Appellant* Court whether there is evidence to sustain the findings of the jury, in answer to questions Nos. One and Two.

Stated succinctly, their findings are: (a) That it was mutually agreed between J. A. Peters (for the bank) and the agent of the receiving carrier that the cattle should be consigned by the bill of lading "In care Peters Commission Company." (b) That when the bill of lading was issued, by the mutual mistake of J. A. Peters and the agent of the receiving carrier, it omitted to state "Care of Peters Commission Company."

The first material inquiry is, why did the City Bank, through J. A. Peters, desire the cattle shipped so as to be delivered to the Peters Commission Company. The answer is:

(a) There had been no trouble or failure to pay drafts by the Peters Commission Company and the City Bank had acquired confidence in them.

(b) There had been trouble in reference to the market—one shipment had been held for the Kansas City bank to open in the morning, and the day's market had been lost.

It might well be that the City Bank (as found in plaintiff's Question No. Four to jury) preferred to ship them "so as to be delivered to Peters Commission Company."

The evidence of the lost market shipment will be found on page 31 of Statement of Facts, and reference is made to the exact language of J. A. Peters: "I know the reason why the cattle going to Kansas City were 'consigned' to J. A. Peters Commission Company in this particular case."

381 Note the language "Were consigned to"—out of the witness's own mouth we learn what he believed the transaction was—a consignment to Peters Commission Company. This is what he wanted and what he intended—it was what the City Bank, through him, wanted and what it intended.

Appellant says this shows that Peters "way-billed" them to Peters Commission Company, but is there not at least an issue of fact as to whether Peters did not intend to so consign them, and by mistake omitted to do so?

Again in his testimony (S. F. 28) Peters says: "It appears in those way bills that the cattle were consigned * * * care of J. P. Peters Commission Company. I billed them that way. As to whether I directed the clerk of the railroad that issued the bill of lading to bill them that way, that is the billing I gave the clerk of the railroad that issued the bill of lading."

Is this testimony all one sided? Is it not clearly susceptible of the construction that the omission from the bill of lading of the words "care Peters Commission Company" was a mutual mistake.

Appellant says that the witness referred to the way bills, but does it not all show that the witness intended to ship the cattle "Care Peters Commission Company?"

Take his statement (bottom of Page 30) "The first shipments were not 'consigned' * * * Care Peters Commission Company like this shipment was."

382 What does the word "consigned" mean—it does not apply to a way bill—it is applicable only to a bill of lading.

The material questions are: (a) Did J. A. Peters intend to execute such documents as to make the cattle deliverable to Peters Commission Company? The answer, is indisputably, "Yes." (b) Did Peters omit the words "Care Peters Commission Company" from the bill of lading by mistake? Clearly the facts, at least, show that there is evidence to support the jury's findings that he did:

On the carrier's side:

Wallwork testified:

"Way bills should be made out in conformity with the bills of lading, unless sometimes the contracts are made and then they come around and ask you to add something on them and the billing clerk is liable to forget to put it on the order * * * it is an oversight of the railroad if they forget to put that on the contract. * * * In this bill of lading the consignor is City National Bank. Our way bills make them consignee care Peters Commission Company. That was not on the bill of lading that was an oversight there." (S. F. 40-41).

Jarvis, Billing Clerk, testified:

"J. A. Peters issued billing instructions on those cattle. His instructions were the cattle were billed from City National Bank to First National Bank of Kansas City, care J. P. Peters Commission Company." (S. F. 35.)

Again the use of the word "billed."

383 We have now: (a) Peters' intention to make the cattle deliverable to Peters Commission Company; (b) the railroad's custom or rule that the way bill and the bill of lading must correspond; (c) Jarvis' statement that J. A. Peters gave the billing instructions; and (d) Wallwork's statement that it was an oversight not to include "Care Peters Commission Company" in the bill of lading.

We know this was a mistake on Peters' part, because he frankly states his purpose to make them deliverable to Peters Commission Company; we know it was a mistake on Jarvis' part, because, under his rules, the way bills and contract must correspond. We know it was a mistake on the carriers' part, because Peters was the only man they knew, he was as to them the shipper; he wanted them delivered to Peters Commission Company and the carrier knew that way bill and bill of lading should correspond. We think we showed a mutual mistake, but whether Appellant thinks we did or not, it is clear that there was evidence sufficient to support an issue of mutual mistake, and the jury on that evidence has found that there was such mutual mistake.

This brings us to the case of *Jones v. Flournoy*, 37 S. W. 236, which, Appellant says, conflicts with this case.

In that case Jones executed a deed to the railroad, one of the provisions of which was that a depot should be established on said railroad at Beeville.

At the time Jones signed, no one for the railroad being present, he added the words "and the establishment of the said depot on the herein described block of land."

384 The depot was established and has been maintained. Jones' suit was to have the deed reformed so as to require the use of the entire block of ground for depot purposes. This he asked on the ground of fraud and mistake.

The preparation of the deed was not participated in by the Appellee—the provision that was inserted was put in by Appellant himself.

The court held there was no fraud and that the very subject of the alleged mistake was considered by appellant when he signed the deed and the clause now attempted to be reformed was supplied by him. The mistake, if any, was unilateral and not of the character that equity will relieve against. There is clearly no conflict between the decision in this case and the decision in *Jones v. Flournoy*.

On the other countless authorities could be adduced that a mutual mistake made in drawing a contract may be alleged, and if satis-

factorily established by evidence, the instrument may be reformed and a decree entered accordingly.

Gammage v. Moore, 42 Tex. 171.

We now come to the Appellant's contention that since the Carmack Amendment, no verbal contract is permissible. As said before, a reference to the cases cited by him will show that the United States and other courts have held that since the Carmack Amendment a verbal contract conflicting with the carrier's tariff and schedules will not be recognized. The reason for this is apparent. Under the Interstate Commerce Act, the rates and schedules are embodied in the tariffs. Not even the carrier can depart from it. To do so is a criminal offense. It follows, of course, that neither the carrier nor the shipper, nor both together, could make either a verbal or a written contract, which did not comply with the tariff and schedules.

This question is incidentally discussed in the case of *G. C. & S. F. v. Vosbinder*, 172 S. W. 763.

It is to be borne in mind that there is no question here of a verbal contract, but the question is whether a written contract, which, by mutual mistake, omits to state the true consignee, that the parties agree upon, whether the true consignee can be ascertained by parol.

To state this question, is of course, to answer it. It has been the law since time immemorial that the true intent and meaning of a written agreement can always be shown by parol, when the omission is caused by fraud, or mutual mistake. The very case of *Waco Tapp Railroad v. Shirley*, 45 Tex., 377, which the Appellant cites, is very good authority for that proposition.

Appellant itself, realizing the weakness of his position that evidence of mutual mistake cannot be adduced, goes on to cite authorities that the evidence must establish the mistake with certainty, and expends many pages arguing that the testimony in this case does not show the mistake.

In one sense, every fact has to be shown with certainty, and for a discussion of just what certainty is required in cases of mutual mistake, the Court is referred to the case of *American Freehold Land & Mortgage Company, v. Pace*, 56 S. W. 377.

One thing is certain. It will not do to submit to the jury that given facts must be found to their satisfaction, or must be proved with clearness, or a certainty, because that requires a heavier burden than the law requires.

See *Rutherford v. Basham*, 38 S. W. 381; *Sabine Tram, v. Bancroft*, 39 S. W. 177; *Rodriguez v. Espanosa*, 25 S. W. 669; which authorities all establish that the question should be submitted to the jury in the ordinary form and with the ordinary tests, and that having answered in the affirmative, the question of mutual mistake is established.

There are some other minor points raised by the Appellant in its motion for rehearing, but we feel that in answering the motion, we have trespassed upon the time and patience of the Court long enough.

To briefly recapitulate this case, the City Bank never complained in its pleadings that the carrier delivered without the production of the bill of lading. Its sole and only allegation was that the carrier did not deliver to the consignee named in the bill of lading, the First National Bank.

Upon inquiry before the jury, it has ascertained that J. A. Peters, the agent of the Bank, had instructed the carrier to deliver to the Peters Commission Company; that both he and the carrier had intended to put this instruction in the way bill and the bill of lading; that by mutual mistake they omitted it from the bill of lading; that the carrier, in compliance with instructions, had delivered the cattle to the Peters Commission Company, and argumentatively eliminating the issue of mistake, we do not believe that any court, in the face of the specific instructions of the City Bank, through its agent, should deliver to the Peters Commission Company, could legally hold the carrier liable in damages for so doing.

The Carmack Amendment, nor any other law, is intended as an instrument of oppression. The natural justice with which we are all imbued revolts at the idea of allowing the City Bank to, on the one hand instruct is to deliver the cattle to the Peters Commission Company and on the other hand to sue is for damages for not delivering them to the First National Bank.

In addition to this, it is shown in the case that there were some 28 other lots which were delivered to the Peters Commission Company, in accordance with the City Bank's instructions, and in every instance, these deliveries were known to the Bank, and it did not complain of them; but on the other hand had acquiesced in and ratified such deliveries.

We respectfully submit, without further discussion, that the motion for rehearing be overruled.

(Signed)

W. A. HAWKINS,
D. W. HARRINGTON,
W. M. PETICOLAS,

Attorneys for Appellee.

388 Endorsed: In Court of Civil Appeals 8th Sup. Jud. District. City National Bank, Appellant vs. E. P. & S. W. et al. Appellee. Answer to Appellant's Motion for Rehearing. Filed Nov. 19, 1920. Court of Civil Appeals, El Paso, Texas. J. L. Driscoll, Clerk, by E. J. Redding, Deputy.

Order of the Court of Civil Appeals Overruling the Appellant's Motion for a Rehearing.

December 2nd, A. D. 1920.

Motion No. 1620/1116.

CITY NATIONAL BANK OF EL PASO, Appellant,

vs.

EL PASO & NORTHEASTERN RAILROAD COMPANY et als., Appellees.

Appeal from the District Court of El Paso County, Texas.

On this day coming on to be heard appellant's motion for a rehearing, and the Court having considered the same, is of the opinion that the same should be overruled.

Wherefore, it is considered, adjudged and ordered that appellant's motion for rehearing be, and the same is hereby in all things overruled.

Minute Book, Vol. 3, at page 70.

389 *Opinion of the Court of Civil Appeals Delivered upon the Overruling of the Appellant's Motion for Rehearing.*

No. 1116.

CITY NATIONAL BANK OF EL PASO, Appellant,

vs.

EL PASO & NORTHEASTERN RY. CO. et al., Appellees.

Appeal from the District Court of El Paso County, Texas.

On Rehearing.

Appellant's counsel has filed a most able motion for rehearing but we see no reason to recede from the views heretofore expressed. In the consideration of the motion we have been greatly assisted by an opposing argument presented by counsel for the appellees. In the preparation of this opinion upon rehearing we, in great measure, use the opposing argument of appellees' counsel.

In its motion appellant calls attention to the failure in our opinion to directly pass upon the issue presented under the first assignment of error to the effect that this case should be controlled by the Carmack Amendment to the Hepburn Act of the Federal Congress enacted June 29th, 1906. This law was in effect when the shipment in question was made. In substance that Act provides that any common carrier receiving property for transporta-

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tion from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it, or by any common carrier to which such property may be delivered, or over whose lines such property may pass. It is insisted that appellant was the lawful holder of the bill of lading issued in this case at the time the cattle were delivered to the J. P. Peters Commission Company and therefore the case comes within the provisions of the Carmack Amendment. The question in this case, as the suit is brought, is not a question of who is the proper party plaintiff, but a question of whether or not the carrier caused any loss. As we view it, the Bank caused the loss by directing the carrier (through its agent, Peters) to deliver the cattle to the Peters Commission Company. Plaintiff's contention in effect is, that in saying "shall be liable to the lawful holder," the Carmack Amendment by implication prevents a delivery to any one except the lawful holder of the bill of lading, and the question now to be determined is whether this is rigidly to be implied from the Carmack Amendment. As touching upon this question, we quote from the case of Cincinnati Railway v. Rankin, 241 U. S. 327, where, in a shipment case, Justice McReynolds said:

"The rights and liabilities of the parties depend upon the Acts of Congress, the bill of lading, and the common law rules, as
391 applied in Federal Courts."

Referring to the holdings in some of the decisions cited by appellant, Ry. Co. vs. Ward, 244 U. S. 386, simply holds that in an interstate shipment, the contract with the initial carrier takes precedence and controls as against the contract of the connecting carriers. T. & P. v. Leatherwood, 250 U. S. 481, simply holds that the first contract embodies the contract for transportation, and its terms in respect to conditions of liability cannot be varied by succeeding contracts.

Adams v. Croninger, 226 U. S. 507, holds that the liability to the lawful holder is not a liability of an insurer, but only the common law liability; and further, that a limitation fairly based on tariff and schedules is valid.

Atchison v. Robinson, 233 U. S. 173, merely holds that an oral contract cannot be allowed, when in conflict with the tariff and schedules.

As bearing upon this question see Ry. Co. vs. Vashinder, 172 S. W. 763, where it was held that the Carmack Amendment does not render invalid all oral contracts of shipment but only those which are in conflict with the schedules and rates published by the Interstate Commerce Commission. In Railway Company vs. Meyer, 155 S. W. 312, it was held that the terms "lawful holder" embraced the owner of the property transported or anyone beneficially entitled. In both of these last two cited cases writs of error were refused by the Supreme Court of Texas.

It has also been held that the consignor, though not the lawful holder of the bill of lading, can bring an action for loss.

392 Aultman v. Coast Lines, 71 So., 284; Bowden v. Railway Co., 94 Alt., 209.

These cases show that the implication from the Carmack Amendment for which Appellant contends, namely, that delivery could only be made upon surrender of the bill of lading, is not a right implication, and while there may be cases in which that implication would be applied, still, the general principals of the common law as said by the Supreme Court, obtain, and the implicated rule is only applied subject to the relative rights, liabilities and duties of the parties as governed by the facts and the form of the action brought.

The Coovert case, (141 Pac., 324) upon which appellant relies, is a perfect illustration of this. In that case, delivery was made to the consignee, after the railroad had been notified by the consignor that the bill of lading had been returned to it, and after it had surrendered the bill of lading to the railroad and demanded the goods; clearly, of course, a wrongful delivery.

The Nebraska Meal Mills v. St. Louis & Southwestern Railway, reported in the 41st S. W. Reporter, Page 810, is almost identical with the case at bar, and is illustrative of the contention which appellees make; namely, that Appellant cannot by its own wrongful action, induce the carrier to make a given delivery, and then, standing upon a rigid technical rule of law, ask the Court to overlook its wrong actions, and to award damages against the carrier for the very delivery which it directed.

393 In the Nebraska Meal Mills case, above cited, that corporation delivered to the Missouri & Pacific a car load of meal for shipment to E. D. Russell in Arkansas. A bill of lading was issued in which it was stipulated that the meal was to be transported to destination and there delivered to the consignee, Russell. The appellant, without notice to the railroad, drew a sight draft on Russell for the price of the meal, attached it to the bill of lading, forwarded it to a bank for collection. The bank presented the draft for payment, but Russell was insolvent and failed to pay. The connecting carrier, having no notice that a draft had been drawn on Russell, or that Russell was insolvent, or that the consignor desired to retain control of the meal until the draft was paid, delivered the meal without requiring the production of the bill of lading.

In that particular case, the Court quotes the bill of lading as having been "straight," but to our minds it was no more a straight bill of lading than the one in this case is. That is to say, an order bill of lading, in the common acceptance of the term, would read "City National Bank, consignor, to order of City Bank, consignee, notify Peters Commission Company."

The instant bill of lading named the First National Bank of Kansas City as consignee, and as the jury found the facts, the bill of lading must be considered as reading "Consignee, First National Bank, care J. P. Peters Commission Company."

394 In Arkansas there was a statute providing that any and all persons, to whom the bills of lading may be transferred, shall be deemed and held to be the owner of the goods, and no

property specified in such bills of lading shall be delivered except on surrender and cancellation of the bills of lading.

The Court said: "If, as counsel for appellant contends, the bill of lading represented the meal and the ownership of the meal was in appellant so long as it held the bill of lading, still, as such owner, it unconditionally directed the carrier to deliver the meal to Russell. It would seem unreasonable to believe that the Legislature intended to impose a liability upon the carrier in favor of the consignor, for acting and carrying out the directions of such consignor in regard to the delivery of the consigned property, for such contention would be contrary to common principles of reason and justice."

It has been repeatedly held that although the shipper's agent had really no authority to limit the value of a shipment, yet, if by his principal, he was placed in charge of the shipment, the carrier could rely upon his instructions and the principal would be bound thereby. *American Brake Shoe Co. v. Marquette Railway*, 223 Fed., 1018; *G. N. Railway v. O'Connor*, 232 U. S. 508.

As to the purpose of the Carmack Amendment: It has also been held that the consignor, though not the lawful holder of the bill of lading, can bring an action for loss. *Aultman v. Coast Lines*, 71 So., 284; *Bowden v. Railway Co.*, 94 Alt., 209. But aside from these matters the rule for which appellant contends has no application to this case. This for the reason that appellant is bound by its own pleadings. It could only recover as it has plead and upon the cause of action asserted by it.

395 Appellant alleged a breach of an agreement to deliver to the First National Bank of Kanass City, the consignee named in the bill of lading.

The jury has found that the delivery could lawfully be made care Peters Commission Company, so that, Appellant's cause of action, as plead by it, has failed; the delivery to the Commission Company being in view of the jury's finding a delivery to the First National Bank.

Appellant now relies upon a new cause of action for delivery without surrender of the bill of lading.

The plaintiff alleged that defendants agreed in writing to carry from El Paso, Texas, to Kansas City, and there to deliver to First National Bank of Kansas City * * *; that the defendant did not carry and deliver said cattle, but so negligently acted as that the cattle * * * were not delivered to said consignee.

As said in the original opinion the cause of action is predicated upon the failure of the carrier to deliver to the consignee, or to the plaintiff, or to any other person authorized to receive the same. The plaintiff can only recover in accordance with his pleadings. Many Texas cases have announced this well settled rule.

Galm v. Wabash Railroad Company, 87 S. W. Reporter 1015, which holds that if the pleader alleges specific actions of negligence he must prove the acts alleged, else he will fail in his action.

396 *Chitty v. St. Louis Iron Mountain & Southern Railway*, 49 S. W. Reporter, 870. In this case the petition alleged that the plaintiff was a passenger in the caboose of the train and was in-

jured by being thrown out of the door. It was held that he could not recover by showing that he had reasonable cause to apprehend a collision and jumped out of the door.

Norton v. G. H. & S. A. Railway Company, 108 S. W. Reporter, 1045. The character of an action is fixed by the allegations in the pleadings and not by facts subsequently disclosed by the evidence; where plaintiff seeks to recover on the grounds that the rails had not been properly spiked to the ties he cannot recover on other grounds.

G. C. & S. F. Railway vs. McKinnell, 173 S. W. 937. The object of pleading is to apprise the Court and the opposite party of the facts upon which the pleader relies as constituting his cause of action; and neither party can be held legally bound to answer grounds not averred in the pleading.

To the same effect, Lemon v. Hanley, 28 Tex., 221.

We think it clear, therefore, that Appellant's reliance upon the rule that the bill of lading, as an order bill, carries the title to the goods, comes too late. The action as brought by it was not founded upon delivery without surrender of the bill of lading, but was a straight suit, to recover against us for failure to deliver to the First National Bank.

In other words, it seems that appellant is seeking to recover upon an issue not tendered by its pleadings.

397 The case of Lee vs. Boutwell, in the 44th Texas, Page 151, does not sustain Appellant's proposition. In that case, plaintiff was to take charge of a stock of horses for the defendant, for which he was to receive every fourth colt. He alleged that the defendant took the horses out of his possession and prevented his performance of the contract. He did not sue for the profits he might have made, but sued for the expense that he had been put to in preparing to carry out the contract. As he alleged it, he proved it, and it was only in the prayer that he had not sufficiently pleaded, and this the court held the prayer for general relief corrected.

This brings us to the question of whether J. A. Peters was the agent of the City National Bank, to handle and ship these cattle. Reference is made in this connection to the cases cited above—American Brake Shoe Co. v. Marquette Railway, 223 Fed., 1018; G. N. Railway Co., v. O'Connor, 232 U. S. 508.

If Peters was the agent of the City National Bank then appellant's theory fails and we have simply an instance where the City National Bank, desiring to ship cattle to Kansas City, first consigned them to the Kansas City Bank, but finding that it might in that way lose a day's market—as it did in one instance, it directed the carrier, thereafter, to so ship them as they should be delivered "Care Peters Commission Company," intending thereby that the cattle should be so billed as that they would be delivered to the Peters Commission Company.

398 Having done this and having made a loss through the failure of the Commission Company to account for this shipment, the City Bank now seeks to shift that loss to the carrier, by taking the position that the Carmack Amendment and authorities in general make the Carrier liable to the holder of the bill of lading, and

take the position that the City Bank, being the holder, it can recover of the carrier, notwithstanding the fact that it (through its agent) directed the carrier to deliver the cattle to the Peters Commission Company. Having obtained the true basis of the relative rights and liabilities of the parties, let us first inquire:

Was J. A. Peters the agent of the City Bank to ship the cattle?

The outstanding feature of this question is contained in the testimony of J. F. Williams, Vice-President of the City Bank, as follows:

"I did not personally go down to the railroad office to ship them. No one from the Bank personally went and looked after that."

"There had been quite a number of these shipments prior to this particular one, and Mr. Peters had looked after all, or nearly all, of them. I knew that he had been looking after the shipments. We knew that these cattle were being handled (at Kansas City) by the J. P. Peters Commission Company. We were allowing Mr. J. A. Peters to bill them out for us and look after getting them up there."

Without reference, at this point, to the further testimony in the case of J. A. Peters and the defendants' agent we have now the facts: (a) that the bank knew that somebody had to go to the railroad office and make the shipping arrangements; (b) that the bank allowed J. A. Peters to do this and that it knew he was doing it; (c) that nobody else from the bank went to the railroad office or had anything to do with making the actual billing arrangements.

Thus Peters became the agent of the Bank, with plenary power to ship the cattle as and to whom he saw fit. No secret limitation of his authority, if such there were, would affect or bind the carrier. He was the only man the carrier knew, the only man the carrier saw—his directions were to deliver the cattle to the Peters Commission Company, and this the carrier did, nor can the City Bank take advantage of any form of contract, in any event, because the delivery to Peters Commission Company was caused (even if contrary to its own wishes) by the action of the City Bank, in vesting J. A. Peters with plenary power to handle and ship the cattle as he saw fit.

In this connection it is to be remembered that there had been other shipments that had been handled as this one was, and had been delivered to Peters Commission Company and that the jury, in answer to Question Five, found that in these prior shipments the cattle had been delivered to Peters Commission Company prior to the payment of the drafts, and that the City Bank knew of this and ratified and acquiesced therein, and that in answer to Question Four, requested by plaintiff, the jury found that had the bill of lading actually consigned the cattle to First National Bank, care Peters Commission Company, the City Bank would not have notified the defendant not to deliver until the draft was paid.

400 We now come to the evidence of mutual mistake, a great deal of which is also relevant as showing what Peters' instructions to the carrier and authority from the City Bank were.

In analyzing this testimony it must be borne in mind that we are simply to determine, as an Appellate Court whether there is evidence

to sustain the findings of the jury, in answer to questions Nos. One and Two.

Stated succinctly, their findings are: (a) That it was mutually agreed between J. A. Peters (of the bank) and the agent of *the agent* of the receiving carrier that the cattle should be consigned by the bill of lading "In care Peters Commission Company." (b) That when the bill of lading was issued, by the mutual mistake of J. A. Peters and the agent of the receiving carrier, it omitted to state "Care of Peters Commission Company."

The first material inquiry is, why did the City Bank, through J. A. Peters, desire the cattle shipped so as to be delivered to the Peters Commission Company? The answer is:

(a) There had been no trouble or failure to pay drafts by the Peters Commission Company and the City Bank had acquired confidence in them.

(b) There had been trouble in reference to the market—one shipment had been held for the Kansas City Bank to open in the morning, and the day's market had been lost.

It might well be that the City Bank (as found in plaintiff's Question No. Four to jury) preferred to ship them "so as to be delivered to Peters Commission Company."

401 The evidence of the lost market shipments will be found on Page 31 of Statement of Facts, and reference is made to the exact language of J. A. Peters: "I know the reason why the cattle going to Kansas City were 'consigned' to J. A. Peters Commission Company in this particular case."

Note the language "Were consigned to"—out of the witness's own mouth we learn what he believed the transaction was—a consignment to Peters Commission Company. This is what he wanted and what he intended—it was what the City Bank, through him, wanted and what it intended.

Appellant says this shows that Peters "way-billed" them to Peters Commission Company, but is there not at least an issue of fact here as to whether Peters did not intend to so consign them, and by mistake omitted to do so?

Again, in his testimony Peters says:

"It appears in those way bills that the cattle were consigned * * * care of J. P. Peters Commission Company. I billed them that way. As to whether I directed the clerk of the railroad that issued the bill of lading to bill them that way, that is the billing I gave the clerk of the railroad that issued the bill of lading."

Is this testimony all one sided? Is it not clearly susceptible of the construction that the omission from the bill of lading of the words "care Peters Commission Company" was a mutual mistake.

Appellant says that the witness referred to the way bills, but does

it not all show that the witness intended to ship the cattle "Care Peters Commission Company?"

402 Take his statement "The first shipments were not 'consigned' * * * Care Peters Commission Company like this shipment was.

What does the word "consigned" mean—it does not apply to a way bill—it is applicable only to a bill of lading.

The material questions are: (a) Did J. A. Peters intend to execute such documents as to make the cattle deliverable to Peters Commission Company? The answer, is indisputably, "Yes." (b) Did Peters omit the words "Care Peters Commission Company" from the bill of lading by mistake? Clearly the facts, at least, show that there is evidence to support the jury's findings that he did.

On the Carrier's side:

Wallwork testified:

"Way bills should be made out in conformity with the bills of lading, unless sometimes the contracts are made and then they come around and ask you to add something on them and the billing clerk is liable to forget to put it on the order * * * it is an oversight of the railroad if they forget to put that on the contract. * * * In this bill of lading the consignor is City National Bank. Our way bills make them consignee care Peters Commission Company. That was not on the bill of lading that was an oversight there."

Jarvis, Billing Clerk. testified:

"J. A. Peters issued billing instructions on those cattle. His instructions were the cattle were billed from City National Bank to First National of Kansas City, care J. P. Peters Commission Company."

Again the use of the word "billed."

We now have: (a) Peters' intention to make the cattle deliverable to Peters Commission Company; (b) The railroad's custom or rule that the way bill and the bill of lading must correspond; (c) Jarvis's statement that J. A. Peters gave the billing instructions; and (d) Wallwork's statement that it was an oversight not to include "Care Peters Commission Company" in the bill of lading.

We know this was a mistake on Peters' part, because he frankly states his purpose to make them deliverable to Peters Commission Company; we know it was a mistake on Jarvis' part, because, under his rules, the way bills and contract must correspond; we know it was a mistake on the carrier's part, because Peters was the only man they knew, he was as to them the shipper; he wanted them delivered to Peters Commission Company and the carrier knew that way bill and bill of lading should correspond.

We think it clear that there was evidence sufficient to support an issue of mutual mistake, and the jury on that evidence has found that there was such mutual mistake.

This brings us to the case of *Jones v. Flournoy*, 37 S. W. 236, which, appellant says, conflicts with this case.

In that case, Jones executed a deed to the railroad, one of the provisions of which was that a depot should be established on said railroad at Beeville.

At the time Jones signed, no one for the railroad being present, he had added the words "and the establishment of the said depot on the herein described block of land."

The depot was established and has been maintained. Jones' suit was to have the deed reformed so as to require the use of the entire block of ground for depot purposes. This he asked on the ground of fraud and mistake.

The preparation of the deed was not participated in by the appellee—the provision that was inserted was put in by appellant himself.

The court held that there was no fraud and that the very subject of the alleged mistake was considered by appellant when he signed the deed and the clause now attempted to be reformed was supplied by him. The mistake, if any, was unilateral and not of the character that equity will relieve against. There is clearly no conflict between the decision in this case and the decision in *Jones v. Flournoy*.

On the other hand countless authorities could be adduced that a mutual mistake made in drawing a contract may be alleged, and if satisfactorily established by evidence, the instrument may be reformed and a decree entered accordingly.

Gammage v. Moore, 42 Tex., 171.

We now come to the Appellant's contention that since the Carmack Amendment, no verbal contract is permissible.

As said before, a reference to the cases cited by appellant will show that the United States and other courts have held that since the Carmack Amendment a verbal contract conflicting with the carriers' tariff and schedules will not be recognized. The reason for this is apparent. Under the Interstate Commerce Act, the rates and schedules are embodied in the tariffs. Not even the carrier can depart from it. To do so is a criminal offense. It follows, of course, that neither the carrier nor the shipper, nor both together, could make either a verbal or a written contract, which did not comply with the tariff and schedules.

This question is incidentally discussed in the case of *G. C. & S. F. v. Vosbinder*, 172 S. W. 763.

It is to be borne in mind that there is no question here of a verbal contract, but the question is whether a written contract, which, by mutual mistake, omits to state the true consignee, that the parties agree upon, whether the true consignee can be ascertained by parol.

To state this question is, of course, to answer it. It has been the

law since time immemorial that the true intent and meaning of a written agreement can always be shown by parol, when the omission is caused by fraud or mutual mistake. The very case of *Waco Tapp Railroad v. Shirley*, 45 Tex., 377, which the appellant cites, is very good authority for that proposition.

As to the contention of the appellant that mutual mistake must be shown with certainty, it may be said in a sense every fact must be shown with certainty. For a discussion of just what certainty is required see *Mortgage Co. v. Pace*, 56 S. W. 377. It will not do to submit to the jury that given facts must be found to their satisfaction, or must be proved with clearness or certainty, because that requires a heavier burden than the law requires.

406 See *Rutherford v. Basham*, 38 S. W. 381; *Sabine Tram v. Bancroft*, 39 S. W. 177; *Rodriguez v. Espanoza*, 25 S. W. 669.

Which authorities all establish that the question should be submitted to the jury in the ordinary form and with the ordinary tests, and that having answered in the affirmative, the question of mutual mistake is established.

To briefly recapitulate this case, the City Bank never complained in its pleadings that the carrier delivered without the production of the bill of lading. Its sole and only allegation was that the carrier did not deliver to the consignee named in the bill of lading, the First National Bank.

Upon inquiry before the jury, it has ascertained that J. A. Peters, the agent of the bank, had instructed the carrier to deliver to the Peters Commission Company; that both he and the carrier had intended to put this instruction in the way bill and the bill of lading; that by mutual mistake, they omitted it from the bill of lading; that the carrier, in compliance with instructions, had delivered the cattle to the Peters Commission Company.

In the face of these findings and upon the issues presented by the appellant's pleadings we see no escape from the conclusion that judgment was properly rendered for the appellees.

The Carmack Amendment, nor any other law, is intended as an instrument of oppression. The natural justice with which we are all imbued revolts at the idea of allowing the City Bank to, on the one hand instruct the carrier to deliver the cattle to the Peters
407 Commission Company and on the other hand to sue for damages for not delivering them to the First National Bank.

In addition to this, it is shown in the case that there were many other lots which were delivered to the Peters Commission Company, in accordance with the City Bank's instructions, and in every instance those deliveries were known to the bank, and it did not complain of them; but on the other hand acquiesced in and ratified such deliveries.

For the reason indicated the motion for rehearing is overruled.

E. F. HIGGINS,
Associate Justice.

Filed Dec. 3, 1920. Court of Civil Appeals, El Paso, Texas.

J. I. DRISCOLL,

Clerk,

By E. J. REDDING,

Deputy.

408 *Order of the Supreme Court of the State of Texas
Refusing Writ of Error.*

In Supreme Court of Texas.

CITY NATIONAL BANK OF EL PASO

vs.

EL PASO & N. E. RY. CO.

From El Paso County, Eighth District.

December 14th, 1921.

This day came on to be heard the application of plaintiff in error for a writ of error to the Court of Civil Appeals for the Eighth District and the same having been duly considered, it is ordered that said application be refused. That the applicant, City National Bank of El Paso, Texas, and surities, J. F. Williams and W. Cooley, pay all costs incurred on this application.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, do hereby certify that the above is a true and correct copy of the judgment rendered by the Supreme Court on the application for writ of error in the above styled cause.

Witness my hand and the seal of said court this the 6th day of Jan. A. D. 1922.

(Signed)

F. T. CONNERLY,

Clerk,

[SEAL.]

By B., *Deputy.*

Filed January 10, 1922. Court of Civil Appeals, El Paso, Texas.

J. I. DRISCOLL,

Clerk.

409 The Court of Civil Appeals for the Eighth Supreme
Judicial District of Texas, at El Paso, Texas.

CITY NATIONAL BANK OF EL PASO, TEXAS, Appellant,

vs.

EL PASO & NORTHEASTERN RAILROAD CO. et als., Appellees.

Certificate.

I, J. I. Driscoll, Clerk of the Court of Civil Appeals of the Eighth Supreme Judicial District of the State of Texas, hereby certify the foregoing transcript consisting of 409 pages constitutes a full, true and correct copy of the proceedings had and orders entered in the above entitled cause, as set forth, as the same appear on file and of record in this office.

The foregoing constitutes the entire transcript in the cause.

Witness my hand and the official seal of said court, this the 28 day of February, A. D. 1922.

[Seal of Court of Civil Appeals of the State of Texas.]

J. I. DRISCOLL,
Clerk.

410 From the Clerk's Office, Court of Civil Appeals, El Paso.

In the Supreme Court of the United States, October Term, 1921.

No. 824.

THE CITY NATIONAL BANK OF EL PASO, TEXAS,

vs.

EL PASO & NORTHEASTERN RAILROAD COMPANY et al.

Comes now the parties by their respective counsel, and hereby stipulate and agree that the record already on file in the office of the Clerk of the Supreme Court of the United States shall stand as a return to the certiorari herein granted by the Supreme Court of the United States, and the writ thereon issued directed to the Honorable the Judges of the Court of Civil Appeals of the Eighth Supreme Judicial District of the State of Texas, same dated the 29th day of April, A. D. 1922.

A. H. CULWELL,
DYER, CROOM & JONES,
*Attorneys for the City National
Bank of El Paso, Texas.*

W. A. HAWKINS,
DEL W. HARRINGTON,
*Attorneys for the El Paso & North-
eastern Railroad Company et al.*

THE STATE OF TEXAS,
County of El Paso:

I, J. I. Driscoll, Clerk of the Court of Civil Appeals in and for the Eighth Supreme Judicial District of the State of Texas, do hereby certify that the foregoing on this page, is a true and correct copy of the stipulation and agreement of counsel, on the return of Writ of Certiorari to the Supreme Court of the United States as the same now appear on file in my office in Cause No. 1116, styled, City National Bank of El Paso, Texas, Appellant vs. El Paso & Northeastern Railroad Company, et al., Appellees.

In witness whereof, I hereunto set my hand and affix the
411 seal of said Court at El Paso, this the 8th day of May, A. D.
1922.

[Seal of Court of Civil Appeals of the State of Texas.]

J. I. DRISCOLL,
Clerk,
By E. J. REDDING,
Deputy.

412 & 413 [Endorsed:] No. 1116. In Court of Civil Appeals,
Eighth Supreme Judicial District of Texas, El Paso. City
National Bank of El Paso, Texas, Appellant, vs. El Paso & North-
eastern Railroad Company, et al., Appellees. J. I. Driscoll, Clerk.

414 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the
Judges of the Court of Civil Appeals of the Eighth Supreme Judi-
cial District of the State of Texas, Greeting:

Being informed that there is now pending before you a suit in
which City National Bank of El Paso, Texas, is appellant, and El
Paso & Northeastern Railroad Company et al. are appellees, which
suit was removed into the said Court of Civil Appeals by virtue of
an appeal from the District Court of El Paso County, and we, being
willing for certain reasons that the said cause and the record and
proceedings therein should be certified by the said Court of Civil
Appeals and removed into the Supreme Court of the United
415 States, do hereby command you that you send without delay
to the said Supreme Court, as aforesaid, the record and pro-
ceedings in said cause, so that the said Supreme Court may act
thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-ninth day of April, in the year of our Lord one thousand nine hundred and twenty-two.

WM. R. STANSBURY,

Clerk of the Supreme Court of the United States.

416 & 417 [Endorsed:] File No. 28,779. Supreme Court of the United States, October Term, 1921. No. 824. The City National Bank of El Paso, Texas, vs. The El Paso & Northeastern Railroad Company et al. Writ of Certiorari.

418 [Endorsed:] File No. 28,779. Supreme Court U. S., October Term, 1921. Term No. 824. The City National Bank of El Paso, Texas, Petitioner, vs. The El Paso & Northeastern R. R. Co. et al. Writ of certiorara and return. Filed May 13, 1922.

(6668)

FILED

FEB 21 1922

WM. S. STANLEY

IN THE
SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, A. D. 1922.

No. 508

THE CITY NATIONAL BANK of El Paso, Texas,
Petitioner Appellant.

vs.

EL PASO & NORTHEASTERN RAILWAY COM-
PANY, et al.
Respondents.

ARGUMENT

in behalf of Petitioner Appellant.

DYER, CROOM & JONES,
A. H. OUELLELL,

Attorneys for Petitioner Appellant.

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IN THE
SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, A. D. 1922.

No. 309

THE CITY NATIONAL BANK of El Paso, Texas,
Petitioner Appellant.

VS.

EL PASO & NORTHEASTERN RAILWAY COM-
PANY, et al,

Respondents.

ARGUMENT

in behalf of Petitioner Appellant.

The Appellant Bank sued the carriers for a breach of contract, alleging in effect that in October, 1911 it delivered eight hundred and forty-seven head of cattle to be carried from the City of El Paso, Texas to Kansas City, Missouri, and there to be delivered to the First National Bank of Kansas City. That a bill of lading between the Bank and the El Paso & Southwestern Company, initial carrier, was duly executed and delivered, covering the carriage of said cattle. That said cattle were not safely carried and delivered according to said contract, but on the contrary the cattle were so carelessly and negligently handled that the same and the value thereof were wholly lost to Appellant and said cattle were not delivered to the consignee. (P. R. 24).

The carriers answered interposing several defenses, and especially among others, that contemporaneously with the execution of the written contract of carriage, one Peters, acting as Shipping Agent, directed that the way bills covering said shipment be drawn so that the consignee be stated "First National Bank of Kansas City, care J. P. Peters Commission Company", and that thereunder the shipment was delivered to J. P. Peters Commission Company. That the instructions from said Peters were that delivery be so made.

It further plead that the Appellant had previously made other shipments, which had been so consigned, on waybills similarly prepared, and that thereby the carriers were led to believe that delivery to J. P. Peters Commission Company was in full accordance with the livestock contract, and that same was satisfactory to the City National Bank. (P. R. 4-13).

To this pleading the Bank replied, among others, to the effect that the shipment was made on a written bill of lading as required by law, same was interstate in character, and that in the bill of lading the consignor was stated as the City National Bank, and the consignee as the First National Bank, Kansas City, and that delivery had never been made as therein contracted. (P. R. 14-17).

And, further to the effect that it would have refused to accept a bill of lading naming the First National Bank, Kansas City, care J. P. Peters Commission Company, as consignee, that the bill of lading as issued and delivered represented the true contract, and the only one in the circumstances that it would have accepted. (P. R. 17-18.)

Under the charge of the Court as given, and answers of the jury to questions propounded, judgment was en-

tered in favor of defendants. The judgment so entered was by the Court of Civil Appeals, Eighth Supreme Judicial District of Texas affirmed, and writ of error to the Supreme Court of Texas was denied.

The Texas courts held in effect that the bill of lading as written and delivered was not binding upon the parties thereto, and that under the direction given by Peters, who secured the bill of lading, it was proper to make delivery to Peters Commission Company, without surrender of the bill of lading.

The facts in brief are about as follows:

It is admitted that a bill of lading was duly issued covering the cattle in question by the El Paso & Southwestern Company of the first part, and City National Bank of second part, and wherein said cattle were consigned to First National Bank, of Kansas City.

The contract of shipment among others contained the following:

"Twelfth. It is also expressly understood that all promises and agreements respecting or in anywise relating to the subject hereof are fully expressed herein, and no others, are made or exist."

"Thirteenth. First party hereby admits that it has received at the station and on the date first above written, from second part, certain livestock as hereinbefore described, to be transported as aforesaid at the rate or rates, and subject to the rules and conditions hereinbefore and hereinafter referred to, and agrees that said livestock will be delivered as aforesaid unto second party or order, or assigns, or connecting lines if destined beyond, subject to the conditions hereinbefore

expressed on the payment of transportation charges as agreed."

"Sixteenth. That the evidence that second party, after fully understanding and accepting the terms, covenants and conditions of this contract including the printed rules and regulations on the back hereof, and that it all constitutes a part hereof, fully assents to each and all of same, in his signature hereto." (P. R. 59-60.)

The Appellant Bank, on receipt of said bill of lading, caused draft to be made in its favor on J. P. Peters Commission Company, Kansas City, Missouri, for the value of the shipment, which draft, attached to the bill of lading, was forwarded to the First National Bank, Kansas City, with written instructions that the cattle were to be released upon payment of the draft, if refused when presented to hold and wire. (P. R. 63-64).

The draft was never paid, but it, together with the bill of lading, was afterwards returned to the City National Bank (P. R. 63), and except for the sum of Five Thousand Dollars the Appellant has never received pay for the cattle involved.

J. F. WILLIAMS, Vice-president of the City National Bank, after giving the above facts, testified that J. A. Peters (who had superintended loading of the cattle in El Paso for the Bank) had no connection with the City National Bank, and was not employed by it, that he was assisting one Cameron in bringing the cattle out of Mexico, tallying, loading and getting the bills of lading; that he brought the bill of lading in question to the bank and there delivered it (P. R. 63).

That the cattle had originally been consigned to the City National Bank by a bank in Chihuahua, Mexico,

with a draft attached, and after the cattle reached the American side the amount of the Chihuahua draft was by the El Paso Bank paid, and cattle shipped to Kansas City for sale, that the Bank had no arrangements with Mr. Peters to handle them in Kansas City. That there had been quite a number of these shipments, and Peters had looked after them, and on the other shipments, the returns had been made to the Bank prior to delivery, and the Bank did not know that they had been turned over to the Peters Commission Company and then returns made to the Bank. (P. R. 65).

"We presume that they all went to the J. P. Peters Commission Company eventually. They were to be delivered when we got our money. The only security we had in advancing the money on these cattle was to ship to somebody we knew to be absolutely responsible, which was our Bank in Kansas City. The Bank was instructed to deliver the cattle when the draft was paid. We had no arrangement with the First National Bank, of Kansas City, whereby the bank was to pay us this draft before the cattle were sold. (P. R. 66). We were not interested in who or how the draft was to be paid as long as they (the cattle) were in our possession, they were not to be delivered until the draft was paid. It was up to Mr. Peters to get the money and pay the Bank. I did not understand that Mr. Peters would have to have possession of the cattle in order that he might handle them in that way. We did not rely upon Mr. Peters getting the money for these cattle and turning the money into the First National Bank. We relied upon somebody paying the bank money before the cattle were delivered. Nobody had a right to sell the cattle until they were released, and nobody could release them, according to our idea, until the money was paid. That was exactly the understanding. We

had no arrangement whereby anybody would furnish us the money before the cattle were sold. We had no knowledge to the contrary that a single one of these shipments prior to this particular one in which the money was paid over to the First National Bank before the cattle were sold. We presume that all of it was, we always got our money. We were allowing Mr. J. A. Peters to bill them out for us and look after getting them up there, and we knew that somebody had to make some arrangements to get money and pay for them after they got there." (P. R. 66-67.)

"Our interest in these cattle was simply that they were sent here on a draft from a bank in Chihuahua, and we advanced the money to the extent of the draft, and the cattle were turned over to us and we billed them to the First National Bank of Kansas City for the purpose of collecting that money if they were delivered to anybody. The cattle were in our possession here and billed out by our order to Kansas City. We were the consignors." (P. R. 67).

"I never saw, prior to the time that we drew this draft and sent this bill of lading to the First National Bank of Kansas City, another writing regarding this shipment from the railroad company. *Our purpose in shipping these cattle to Kansas City, with the bill of lading ourselves as consignor and the First National Bank as consignee, was to collect the money, to get back the money we advanced on the cattle.* We were not interested in what the J. P. Peters Commission Company did with the cattle so long as they paid the money to the Bank. A draft was drawn on the J. P. Peters Commission Company by young Peters, and that was attached to bill of lading and the bill of lading was to be delivered when the draft was paid. That was the instruction that went with the draft. They were cat-

the brokers and what arrangement they might have as to what to do after it was paid, or where they were to get the money, we had nothing to do with that. Under our arrangement with the First National Bank, they had the authority to release these cattle on the payment of the amount." (P. R. 67-68).

JOHN F. WAITE, for the defendant, who was office manager for the J. P. Peters Commission Company at Kansas City, among other things said:

"That there had been quite a number of these cattle shipments. A representative of the First National Bank had been to our office the day the cattle arrived. He had been there at other previous times with reference to drafts on shipment. Draft is made out and sent to the First National Bank of Kansas City for collection, and they send their man down to the stockyards. The draft is taken up by check and the collector goes back to town. He was there the day before this shipment came in and I told him the cattle were not in. He was there the next day, the cattle were then in the pens, and I told him the cattle were not sold. I did not tell him they were in the pens of the J. P. Peters Commission Company. I suppose the cattle were sold in the course of half hour after he left. These cattle were down there when the collector of the First National Bank of Kansas City, Missouri, came down and asked me about them the last time, and I told him they were in the pens. The records show that the cattle were sold and brought a net credit of \$20,260.99 in favor of the Cameron Cattle Company. Previous shipments had been delivered to the yard man for the J. P. Peters Commission Company. The collector of the First National Bank did not know of the delivery of the previous shipments, nor did the Bank. As I said, the Bank in El Paso would send a draft to the First National

Bank of Kansas City for collection, and they would send it down the office of the J. P. Peters Commission Company, and we would issue them a check to take up the draft. The drafts were always drawn on the J. P. Peters Commission Company, and on the previous shipments, the drafts had been paid to the Bank. In this particular instance the draft was not paid."

"There is a general custom with reference to how these cattle are handled after they reach Kansas City, as to whether they are handled on the waybill or otherwise. Business men, bankers and others dealing in cattle know of the custom and manner of handling cattle after they reach Kansas City. On all the previous shipments, before the cattle were sold and delivered, after reaching the Peters Commission Company, they had taken up and paid a draft drawn against the Commission Company through the First National Bank of Kansas City. In some cases the draft did not get there before the cattle. In those cases the draft was held until the cattle were entered and sold. I have not stated that they would come down with the draft and before the cattle were sold and delivered that the company would give a check for the amount that was represented by that draft drawn by the City National Bank on the First National Bank. If the cattle came first, and were sold, when the draft was presented we paid it. If the draft came before the cattle were in the yards they would hold the draft until the cattle were sold." (P. R. 68-69).

The waybill on this shipment is dated October 27th, 1911. The shipment in question reached us about the 30th. It says on the waybill, The City National Bank is named as consignor, and the First National Bank of Kansas City is consignee, care J. P. Peters Commission Company. I am familiar with the way shipments of

livestock at the Kansas City stock yards at that time were handled, with reference to whether they were handled on the waybills or livestock contract; they were handled on the stubs of the waybill. These cattle were handled at the Kansas City stock yards on the stubs of the way bill. They are made out by the agent of the railroad company. I have had experience with contracts between shipper and consignee, the waybill has no contract on it at all, of the agreement between the shipper and the carrier. In the shipping of a lot of cattle there is a contract made between the railroad company and the shipper, and in the contract there is a consignee at the place of destination, The way bill is then made out by the railroad company. (P. R. 70).

J. A. PETERS, for defendant, among other things said:

That he was the son of the J. P. Peters who was the sole owner of the J. P. Peters Commission Company. I was working for the J. P. Peters Commission Company in October, 1911. That he was connected with the shipment in question. The cattle were bought by John Cameron, in Mexico, and were by him consigned to the City National Bank, at El Paso, at which place I took charge, not only for the City National Bank but for Mr. Cameron and the J. P. Peters Commission Company. I signed the contracts and looked after the shipments. This was one of a number of shipments. It appears in those waybills that the cattle were consigned by the City National Bank to the First National Bank of Kansas City, care J. P. Peters Commission Company. I billed them that way. I think I gave the agent the direction with reference to the shipment at the same time the contract was executed. Practically all of these shipments were handled under the same agreement between Mr. Cameron and the City Na-

tional Bank and myself. I do not remember that I took the contract under which these cattle moved after I executed it; I might have taken the contract at the time or they might have called a messenger and sent it to the Bank. The contract was sent to the Bank and attached to a draft on the J. P. Peters Commission Company in Kansas City. After I had given the directions about the waybills, I went to the Bank and signed the draft and had nothing else to do with it. (P. R. 70-71).

I do not remember that the City National Bank ever instructed me to bill these cattle in care of the Peters Commission Company. They never did that I remember of. I had no authority to sell the cattle without handling them for the City National Bank. We handled them as brokers. We got our commission whether we sold them here or in Kansas City. I had no authority to give bills of sale or execute any bills of sale for these cattle. I do not remember that the City National Bank authorized me to bill these cattle care the J. P. Peters Commission Company instead of to the First National Bank of Kansas City. I do not remember of ever talking to them about it or telling them I had done it. I would not want to swear either way. I think the cattle were entered at the port by the City National Bank. My interest in the cattle was merely an equity and the City National Bank had title and possession and claimed the cattle until their money was paid, and it was the understanding that I had no right to release these cattle from the possession and title of the City National Bank until they were first paid for. (P. R. 72-73).

JOHN FOX, livestock agent for the Rock Island Railroad Company at Kansas City, among other things said:

I am familiar with the Kansas City stockyards, and with the method and manner of handling livestock there. I am familiar with the general custom of handling cattle on that market as to their delivery and as to whether they were delivered on a waybill or livestock contract. I was familiar with that custom at that time. It was the custom to deliver cattle at the stockyards on the waybill stubs; the contracts were not used. The receiving agent of the carriers rarely, if ever, knew anything about the contract. I could not say that this custom was known to the First National Bank of Kansas City. When the railroad delivers to the stockyards it looks to the stockyards company to reimburse them for any freight charges or other charges that may be made against the cattle. The railroad company does that without regard to who they are consigned to; they deliver them to the stockyards company and take them out without regard to who they are consigned to. When a shipment of cattle comes to Kansas City the railroad turns them over to the stockyards. It is my understanding that the stockyards company is bound to the railroad company to see to proper delivery. Shipments are delivered under waybills. The shipment of October 27th was handled in delivering on original waybill. I could not say whether that custom was known by the First National Bank. (P. R. 73-74).

E. F. REESE testified to like effect. (P. R. 74-75).

EDWARD W. JARVIS, for defendants, testified that he was bill clerk at El Paso, in 1911. He identified the bill of lading above described, and said that he wrote the waybills at the direction of J. A. Peters, care J. P. Peters Commission Company. (P. R. 75-77.)

J. C. WALLWORK, joint agent at the joint warehouse at the railroads in El Paso, testified:

That he recalled the series of shipments made by the City National Bank to the First National Bank of Kansas City, in 1911. That he had no recollection of any conversation with Peters concerning the shipment on October 27th, before the shipment was made. A bill of lading precedes the waybill. After the execution of the bill of lading, then comes the waybill. The bill of lading always precedes a waybill. Waybills are for carrying freight for the enlightenment of the conductor, for the conductor to know what he has on his train. In other words, we make up a train load of cattle and execute bills of lading, and then we issue the waybills and deliver those to the conductor; when he gets to a terminal he passes those along until they reach their destination. That is the purpose and object of waybills. The shipper does not sign the waybills, he has nothing to do with them. They are for the use of the railroad company. Nobody has possession of the waybills except the conductor of the railroad. Waybills should be made out in conformity with the bills of lading. (P. R. 78).

J. F. WILLIAMS, Vice-president of Appellant Bank, further said:

I had charge of this shipment of cattle for the City National Bank. I never at any time instructed J. A. Peters to execute or instruct the Railway company to execute for the City National Bank a waybill consigning the cattle or any of the shipment of cattle to the First National Bank, care J. P. Peters Commission Company. I did not know at the time those waybills were issued, or at any time prior to the shipment involved was shipped, that those waybills had any shipping directions to J. P. Peters Commission Company or that any of the bills of lading that were presented to me by J. A. Peters covering this or previous ship-

ments had that clause in them. I do not recall seeing any with that clause in it. *I would not have accepted any with that clause in it.* We shipped the cattle with bill of lading directed to the First National Bank, draft attached, because we had advanced money on these cattle. We thought we would consign them to a reliable institution representing us, and we thought they would collect the money and we would get our money back. In every instance I got a copy of the livestock contract. I got all the contracts that were made by Peters covering these shipments on every case we advanced any money, that was our only way to reimburse ourselves. (P. R. 79).

Peters Commission Company was not handling the cattle from Juarez to El Paso; it was John T. Cameron. Peters Commission Company was buying them after they got to Kansas City. Our deals were entirely with John T. Cameron. The amount outstanding has never been paid to the Bank. (P. R. 80).

BRIEFLY SUMMARIZED

the record shows that the initial carrier issued a bill of lading to the Appellant Bank covering the cattle in question, and in said bill of lading the First National Bank of Kansas City, Missouri, is shown as consignee. Appellant accepted the bill of lading, attached a draft thereto for the value of the cattle on J. P. Peters Commission Company, sent both the bill of lading and draft to the Kansas City Bank, with directions to release the cattle on payment of draft, if draft not paid to wire for instructions.

J. A. Peters, son of the owner of J. P. Peters Commission Company of Kansas City, attended to securing the bills of lading. He gave to the bill clerk of the initial carrier directions to be placed on the waybill

that shipment was to be made to the First National Bank of Kansas City, care J. P. Peters Commission Company. He had no authority to give this direction. Appellant bank did not know that such direction had been given, but relied entirely upon the bill of lading that was issued. Shipment would not have been made as per the direction so given by Peters to the bill clerk of the railroad. The bank wanted shipment made so that it would be sure to get its money. The bill of lading itself provided that all promises and agreements respecting or in anywise relating to the subject hereof are fully expressed therein, and no others are made or exist, and likewise that the carrier would deliver the shipment under second party, or order, or assigns.

Carriers delivered the shipments to the J. P. Peters Commission Company without surrender of the bill of lading, or of payment of draft, and as a result of which, Appellant bank has never been paid the full value of the draft or of the cattle.

Young Peters, who attended to the shipping, admitted that he did not advise the Appellant Bank of the direction he had given that the shipment should be made in care of J. P. Peters Commission Company, and the Bank did not know this. It was testified for carrier that there was a custom in Kansas City to make deliveries on waybills without reference to the bill of lading. This custom was not known to either Appellant bank or First National Bank of Kansas City. The waybill is no part of the contract between the shipper and the carrier. It is merely a railroad document issued for use and direction of conductors en route and is never signed by the shipper.

On this state of case, the question as to the binding effect of the bill of lading is involved, as well as whether it is permissible to show a custom at point of delivery

which materially varies the terms of the bill of lading, and considering these questions, as we think they arise, it is submitted:

The shipment was, of course, interstate, and as such the rights and liabilities of the parties were exclusively controlled by the Act of Congress known as the Carmack Amendment. This Act has been before the Court in many cases, and it has been construed so often that specific reference might at first blush seem unnecessary. However, in view of the construction placed thereon by the Texas Courts, we are constrained to present some of the cases in which the questions here at issue have arisen.

This Act, 34 Stat. 584c. 3591, on the issue at bar was before the Court in *Adams Express Company v. Cronninger* 226 U. S. 491. There it is said:

"The significant and dominating features of that amendment are these:

"First: It affirmatively requires the initial carrier to issue 'a receipt or bill of lading therefor', when it receives 'property for transportation from a point in one state to a point in another.'

"Second: Such initial carrier is made 'Liable to the lawful holder thereof for any loss, damage or injury to such property caused by it.'

"Third: It is also made liable for any loss, damage or injury to such property caused by 'any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass.'

"Fourth: It affirmatively declares that 'no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed.'

"Prior to that amendment the rule of carrier's liability, for an interstate shipment of property, as enforced in both federal and state courts, was either that of the general common law as declared by this court and enforced in the Federal courts throughout the United States, *Hart v. Pennsylvania Railroad*, 112 U. S. 331; or that determined by the supposed public policy of a particular State, *Pennsylvania Railroad v. Hughes*, 191 U. S. 477; or that prescribed by statute law of a particular State, *Chicago &c. Railroad v. Solan*, 169 U. S. 133.

"Neither uniformity of obligation nor of liability was possible until congress should deal with the subject. * * * * *

"That the legislation supersedes all the regulations and policies of a particular State upon the same subject results from its general character. *It embraces the subject of the liability of the carrier under a bill of lading which he must issue and limits his power to exempt himself by rule, regulation or contract.* (Italics ours) Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the State upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the State ceased to exist."

And, in *St. L. I. N. & S. Railway Company v. Starbird*, 243 U. S. at page 597, this is said:

"Since the passage of the Carmack Amendment the state court must be held to have known that interstate shipments were covered by a uniform federal rule which required the issuance of a bill of lading, and that that bill of lad-

ing contained the entire contract upon which the responsibilities of the parties rested. This is the result not only of our own holdings, but is universally held in the state courts.

"The federal right is not required to be pleaded in any special or particular form. It is enough that it be relied upon and in a proper manner called to the attention of the Court."

It thus appears that the initial carrier simply did its duty in issuing the bill of lading made basis of this action, and when issued it embodied all of the terms of the contract of carriage, such is the specific holding in the *Starbird* case. The shipments involved were consigned to the First National Bank, Kansas City, Missouri, as shown in the bills of lading, and it was the duty of the carrier to deliver in accordance with that recital. Any deviation therefrom, which resulted in loss to the shipper, fixed absolutely the liability sought to be enforced.

This view is further emphasized by what was said in *G. F. & A. Railway v. Blish Company*, 241 U. S. 194 to this effect:

"The connecting carrier is not relieved from liability by the Carmack Amendment, but the bill of lading required to be issued by the initial carrier upon an interstate shipment governs the entire transportation and thus fixes the obligations of all participating carriers to the extent that the terms of the bill of lading are applicable and valid. 'The liability of any carrier in the route over which the articles were routed, for loss or damage, is that imposed by the act as measured by the original contract of shipment so far as it is valid under the act.' *Kansas Southern Ry v. Carl*, 227 U. S. 639, 648. See *Adams Express Co. v. Croninger*, 226 U. S. 491, 507, 508; *C. C. & St. L. Ry. v. Dettlebach*, 239 U. S. 538, 591; *Northern Pacific Ry.*

v. Wall, Ante, p. 87. Southern Ry. v. Prescott, 240 U. S. 632, 637.

"These decisions also establish that the question as to the proper construction of the bill of lading is Federal question. The clause with respect to the notice of claims—upon which the plaintiff in error relies in its second contention,—specifically covers 'failure to make delivery'. It is said that this is not to be deemed to include a case where there was not only failure to deliver to the consignee, but actual delivery to another or delivery in violation of instructions. But 'delivery' must mean delivery as required by the contract, and the terms of the stipulation are comprehensive,—fully adequate in their literal and natural meaning to cover all cases where the delivery has not been made as required. When the goods have been misdelivered there is as clearly a 'failure to make delivery' as when the goods have been lost or destroyed; and it is quite as competent in the one case as in the other for the parties to agree upon reasonable notice of the claim as a condition of liability. It may be urged that the carrier is bound to know whether it has delivered to the right person or according to instructions. This argument, however, even with respect to the particular carrier which makes a misdelivery, loses sight of the practical object in view."

In the case at bar, there was a misdelivery and as we construe the Blish case, its holding is to the effect that a misdelivery is no delivery, and that the carrier is bound to know whether it has delivered to the right person. And, in that connection we quote from A. & T. Railway v. Harold, 241 U. S. 377:

Whether in the absence of legislation by Congress the attributing to an interstate bill of lading of the exceptional and local characteristic applied by the court below in conflict with

the general commercial rule constituted a direct burden on interstate commerce and was therefore void need not now be considered. This is so because irrespective of that question and indeed without stopping to consider the general provisions of the Act to Regulate Commerce it is not disputable that what is known as the Carmack Amendment to the Act to Regulate Commerce (act of June 29, 1906, c. 3591, Sec. 7, 34 Stat. 593) was an assertion of the power of Congress over the subject of interstate shipments the duty to issue bills of lading and the responsibilities thereunder which in the nature of things excluded state action. *Adams Express Co. v. Croninger*, 226 U. S. 491, 505-506; *Mo. Kan. & Tex. Ry. v. Harriman Bros.*, 227 U. S. 657, 671 - 672; *Boston & Maine R. R. v. Hooker*, 233 U. S. 97, 110; *Atchison, Topeka & Santa Fe Ry. Co. v. Robinson*, 233 U. S. 173, 180; *Cleveland & St. Louis Ry. Co. v. Dettlebach*, 239 U. S. 588; *Georgia, Florida & Alabama Ry. v. Blish Milling Co.* ante, p. 190.

"Indeed in the argument it is frankly conceded that as the subject of a carrier's liability for loss or damage to goods moving in interstate commerce under a bill of lading is embraced by the Carmack Amendment, state legislation on that subject has been excluded. It is insisted, however, that this does not exclude liability for error in the bill of lading purporting to cover an interstate shipment because 'Congress has legislated relative to the one, but not relative to the other'. But this ignores the view expressly pointed out in the previous decisions dealing with the Carmack Amendment that its prime object was to bring about a uniform rule of responsibility as to interstate commerce and interstate commerce bills of lading,—a purpose which would be wholly frustrated if the proposition relied upon

were upheld. The principal subject of responsibility embraced by the act of Congress carried with it necessarily the incidents thereto."

It is noted that there a contention was made that the subject of error in a bill of lading was not treated by the Carmack Amendment. The contention was overruled. Such is the contention of the carriers in the case at bar. That is, they tell us that the bill of lading should have read "consigned First National Bank, Kansas City, Missouri, care J. P. Peters Commission Company". But, as we understand the holdings they have consistently been to the effect that the contract portion of a bill of lading cannot be varied in any respect, and the facts in this case indicate the wisdom of that construction. It definitely appears that Appellant bank was making the shipment to the First National Bank of Kansas City in order that it might be protected in the amount of money outstanding. It would not have accepted a bill of lading that carried the clause contended for by the carriers. And, looking at the question practically, having in mind all the while the object of the shipper, what protection would it have had by making the shipment direct to the company that was to pay the money? Or, stated reversely, if it had been the intention of the shipper that the cattle were to be sent in care of Peters Commission Company, what was the use of consigning them to the Kansas City Bank at all? If the Peters Commission Company was to be given possession of the cattle on arrival, without taking up the bill of lading or otherwise paying the value of the cattle, why was the shipment not sent to it direct? These questions answer themselves. It is not disputed that the object of the shipper was to secure payment of the draft before disposition of the cattle, and in this situation it would have been poor business, and poorer judgment, to have accepted a bill of lading con-

taining the clause insisted upon by the railroads. In fact the clauses appearing in the way bills really disputed each other, and the clause which the carriers seek to ingraft upon the contracting bank would have left it without protection. Therefore, and as above stated, this very case illustrates the wisdom of the Carmack Amendment, and the construction placed thereon to the effect that its conditions may not be impeached as the prime object of bringing about a uniform rule of responsibility, as held in many cases, would be destroyed if different conditions than those stated in the contract could be added by parole, as it were.

And, the effect of the defense interposed by the carriers is to say that another and different contract was really made than the one stated in the bill of lading. In *A. T. & S. F. Railway v. Robinson*, 233 U. S. 180, the Court said:

"To give to the oral agreement upon which the suit was brought, the prevailing effect allowed by the charge in the trial court, affirmed by the judgment of the Supreme Court of the State, would be to allow a special contract to have binding force and effect though made in violation of the filed schedules which were to be equally observed by the shipper and carrier. If oral agreements of this character can be sustained then the door is open to all manner of special contracts, departing from the schedules and rates filed with the Commission. *Kansas City Southern Ry. Co. v. Carl*, *supra*, p. 652. To maintain the supremacy of such oral agreements would defeat the primary purposes of the Interstate Commerce Act, so often affirmed in the decisions of this court, which are to require equal treatment of all shippers and the charging of but one rate to all, and that the one filed as required by the act.

"The Supreme Court of the State in this case affirmed the instruction of the trial court upon which the case was given to the jury and held that the oral contract was binding unless it was affirmatively shown that the written agreement, based upon the filed schedules, was brought to the knowledge of the shipper and its terms assented to by him. This ruling ignored the terms of shipment set forth in the schedules and permitted recovery upon the contract made in violation thereof in a case where there was no proof that there was an attempt to violate the published rates by a fraudulent agreement showing rebating or false billing of the property, and no circumstances which would take the case out of the rulings heretofore made by this court as to the binding effect of such filed schedules and the duty of the shipper to take notice of the terms of such rates and the obligation to be bound thereby in the absence of the exceptional circumstances to which we have referred.

"It follows that the ruling of the State Court affirmed in the Supreme Court deprived the plaintiff in error of rights secured by the Federal Statute, when properly construed, which were set up and claimed in the State court."

And, in *Southern Pacific Company v. Stewart*, 245 U. S. 362, the Court used this language:

"The Carmack Amendment requires the carrier receiving property for transportation between points in different States to issue a receipt or bill of lading therefor and makes the carrier liable to the lawful holder thereof for any loss, damage or injury to such property. While there is no specific allegation in the complaint that such bill of lading or receipt was issued, as the law makes it the duty of the carrier to issue the same the presumption is that such duty was complied with."

So that a bill of lading as required by law, having been issued and acted upon by the shipper, it would naturally seem to follow as the night the day, that neither party could contend that it failed to express the true agreement between them. And to prevent the shipper from so contending, the contract in question contained the clauses hereinbefore set out, and to the effect "that all promises and agreements respecting, or in any wise relating to the subject hereof, are fully expressed herein, and no others are made or exist." We maintain that that clause in the bill of lading was valid, and binding and that the carriers will not be allowed to impeach it. It has been held that the clauses in a bill of lading will be construed most strongly against the Companies issuing same. *T. & P. v. Reiss*, 183 U. S. 621. *Queen of the Pacific* 180 U. S. 49.

There is really nothing to construe relative to the clause in question. It speaks for itself, and binds the parties to the effect that the shipment in question was received from the City National Bank of El Paso, and was consigned to the First National Bank of Kansas City, and it was the duty of the carrier so to deliver. *M. K. & T. v. Ward* 244 U. S. 386. In *Southern Railway v. Prescott*, 240 U. S. 638, the Court used this language:

"It is also clear that with respect to the service governed by the Federal statute the parties were not at liberty to alter the terms of the service as fixed by the filed regulations. This has repeatedly been held with respect to rates (*Tex. & Pac. Ry. v. Mugg*, 202 U. S. 242; *Kansas Southern Ry. v. Carl*, 227 U. S. 639, 652; *Boston & Maine R. R. v. Hooker*, 233 U. S. 97, 112; *Louis & Nash. R. R. v. Maxwell* 237 U. S. 94), and the established principle applies equally to any stipulation attempting to

alter the provisions as fixed by the published rules relating to any of the services within the purview of the Act."

And, as possibly directly in point, we refer to *Coovert v. S. P. & S. Ry*, 141 Pac. 324, wherein the Supreme Court of the State of Washington, considering the Carmack Amendment as here presented said:

"This provision of the statute, it will be observed, makes it the duty of common carriers receiving property for interstate transportation to issue a receipt or bill of lading to the consignor of such property, and makes it liable to any lawful holder of such receipt or bill of lading for any loss, damage, or injury to such property caused by it, or by any common carrier to which the property may be delivered, or over whose lines such property may pass. Clearly the statute recognizes the lawful holder of the bill of lading as the person entitled to receive the shipment, regardless of whom may be named as consignee, and, this being true, the carrier delivers the goods transported at its peril, when it delivers without the production of the bill of lading. It cannot, we think, be questioned in this instance that the consignors of the goods were the lawful holders of the bill of lading at the time of the delivery of the goods to the consignee. The consignee had theretofore, returned the bill of lading to the consignors with notice that it would not receive the goods; the consignors had notified the railway company of this refusal, had surrendered to it the bill of lading, and had directed a return of the goods. A delivery to the consignee under these circumstances was a conversion of the goods rendering the company liable for their value to the consignors.

"The contention of the appellant that it is not liable as an initial carrier for the loss of this particular shipment is based on the claim that

it performed its contract of carriage since it carried the goods safely from the point of shipment to the point of destination and the wrong committed, if any, was committed by the connecting carrier. But the duty of an initial carrier with reference to goods transported does not end by merely carrying the goods to their destination safely. Delivery to the person entitled to receive the same, or, if delivery cannot be made, then safe storage subject to the orders of the consignors, is a part of the contract of carriage. The appellant performed neither of those obligations. It neither delivered the goods to the person entitled to receive them, nor did it store them subject to the order of the consignor. It is therefore liable for the loss, as the initial carrier, under the federal statute above cited."

Not only is the contract in question plain and unambiguous and declares that same represents the entire contract between the parties, which under the law makes same binding upon the carrier, but there is another and quite familiar rule which is applicable, to the effect that oral negotiations are considered as merged into the contract that is actually signed. The rule is illustrated in the cases of *C. M. & St. P. Railway v. Jewett*, 171 N. W. R. 757. *Thee v. Wabash Railroad*, 217 S. W. R. 566. *St. L. I. M. & S. Railway v. Jones*, 125 S. W. R. 1025.

And, in *The Delaware*, 81 U. S. 601, speaking relative to the effect of a bill of lading, this Court said:

"Receipts may be either a mere acknowledgment of payment or delivery, or they may also contain a contract to do something in relation to the thing delivered. In the former case, and so far as the receipt goes only to acknowledge payment or delivery, it, the receipt, is merely prima facie evidence of the fact, and not conclusive, and therefore the fact which it recites

may be contradicted by oral testimony, but in so far as it is evidence of a contract between the parties it stands on the footing of all other contracts in writing, *and cannot be contradicted by parol evidence.*" (Italics ours).

The Circuit Court of Appeals, Second Circuit, in *Vanderbilt v. Ocean S. S. Co.* 215 Fed. 887, in declaring the effect of a bill of lading, used this language:

"So far as it embodies the terms of the contract it is not to be varied by parol evidence."

And, certainly as to how and to whom the commodity is to be delivered is a part of the contract.

This Court in *Pennsylvania Railroad v. Olivit Bros.* 243 U. S. at page 575, held that the lawful holder of the bill of lading may sue without proving the ownership of the goods, and in this case it is not denied that Appellant bank was the lawful holder of the bill.

In the case of *Southern Pacific Co. v. Stewart*, 248 U. S. 447, the bill of lading provided in effect that in event of loss or damage, claim would be presented to the Freight Claim Agent of the carrier in writing within ten days after unloading the livestock. The plaintiff sought to avoid the effect of this provision by showing that the carrier had full knowledge of the injuries sustained by the cattle, and that prior to the unloading the cattle remained in the stock pens under the care of carriers' agent for nine hours. That immediately after unloading, daily the shipper and railroad agent were in communication relative to damages sustained and that it was impossible to arrive at the full extent of the injuries within ten days. That the carrier had waived the requirement for demand within ten days by recognizing the shipper's right to recover something, and attempting to settle and compromise. The theory thus plead by the plaintiff was submitted to the jury by the

Court below. This Court, Mr. Justice McReynolds speaking, said:

"Considering the principles and conclusions approved by our opinions in *S. Louis, Iron Mountain & Southern Ry. Co. v. Starbird*, 243 U. S. 592, and *Erie R. R. Co. v. Stone*, 244 U. S. 332 (announced since the judgment below) and the cases therein cited, no extended discussion is necessary to show that upon the facts here disclosed the stipulation between the parties as to notice in writing within ten days of any claim for damages was valid. And we also think those opinions make it clear that the circumstances relied upon by the shipper are inadequate to show a waiver by the carrier of written notice as required by the contract."

To the same effect, is *B. & O. Railroad v. Leach*, 249 U. S. 217. We refer to this case as confirming the view that the bill of lading as delivered to the shipper is binding, particularly as the same contains the clause that it expresses the entire agreement between the parties. In other words, if the carrier is bound by a provision limiting the time within which claims shall be presented, or suit filed, or as exempting it from liability on account of strikes or unusual conditions, then surely a bill of lading naming the parties thereto, and the conditions under which delivery shall be made, is binding.

The case of *P. M. Railway v. French*, 254 U. S. 539, cited by respondent sustains the contention we make. There the shipper took back the bill of lading as well as possession of the car, and sustained no loss. Justice Brandeis used this language:

"In our opinion, there is no exoneration where loss to shipper or subsequent purchaser of the bill results from such failure, but where the loss suffered is not the result of the failure to take

up the bill, mere failure to take it up does not defeat the exoneration. * * * *

"If instead of insisting upon the production and surrender of the bill it chooses to deliver in reliance upon the assurance that the deliverer has it, so far as the duty to the shipper is concerned, the only risk it runs is that the person who says that he has the bill may not have it. If such proves to be the case the carrier is liable for conversion and must, of course, indemnify the shipper for any loss which results. Such liability arises not from the statute but from the obligation which the carrier assumes under the bill of lading."

And such was the risk the carrier took in the instant case. It was charged with the knowledge of the contents of the bill of lading. It was charged with the knowledge that it had contracted to deliver to a particular person and any other delivery which resulted in loss to the shipper fixed absolutely a liability against it, and that is precisely what happened in this case.

We cannot too strongly emphasize the point that the very purpose of making the contract of carriage, as same was made by the shipper in this case, was to prevent the precise loss that occurred, and if young Peters gave direction to the bill clerk to insert on the way bill the clause which authorized delivery to Peters Commission Company, the carrier incurred liability by its failure to insist upon a similar clause in the bill of lading or refusing to vary from the same. If there is to be a uniformity in the construction of the Carmack Amendment, and the liabilities imposed thereunder, which is the key note of all the decisions wherein the question has been at issue, the door cannot be opened to allow excuses to defeat this liability, as same is expressed in the bill of lading issued and delivered. If the carrier can not depart from the contract provisions of a bill of lading, in

one respect, it cannot do so in another, particularly so where the departure is so vital as to effect the possession and right of possession to the very goods in transit. The only way that there may be uniformity is to allow no exceptions from this rule, as any departure strikes at the very heart of the act itself.

The Trial Court should have granted the request of the Bank for a verdict in its favor, as is shown in Bill of Exceptions No. One. (P. R. 37).

The Court likewise erred in refusing to grant the motion after verdict for a judgment. Bill of Exceptions No. 3 (P. R. 39).

The Court likewise erred in permitting testimony relative to the recitals of the waybill as appears from Bill of Exceptions No. 5. (P. R. 41).

We are told, however, that there was a custom in Kansas City yards to make deliveries on the waybills, and on this it is submitted.

(a) A general custom cannot control rules of law.

(b) Resort to custom or usage to vary or control the positive stipulations in a bill of lading is never allowable.

This is but another way of saying that a contract unequivocal in terms cannot be varied by parol. We have not found where the effort to vary a bill of lading by proving usage has been frequent. There are a few cases, however, which seem to pass directly upon that question. It was involved in *Brittan v. Barnaby*, 62 U. S. 527. The shipment moved by water from New York to San Francisco. Bill of lading issued. There was a stamp on the back of it in these words:

"The goods are to be delivered at the shippers' tackle when ready for delivery—not accountable for loss or damage by fire or collision; freight

payable prior to delivery if required; contents unknown."

An attempt was made to show that a practice prevailed in San Francisco which gave an effect to the stamp upon the bill of lading as to control the general rules of commercial law in respect to the payment of freight and the delivery of merchandise from shippers. The Court said:

"The trade of San Francisco is already large; every day develops its resources and the advantages of its position for commerce. No doubt it has not as yet those facilities for the landing of merchandise and loading of ships which our older ports have; but that will not give to any practice there, however general it may have become, the force of custom to release its merchants from the obligation of an ordinary bill of lading. If inconveniences exist in the particular just mentioned, it will be best for the merchants of San Francisco, and those with whom they deal in other parts of the world, that the contract of a bill of lading should have its fixed meaning and obligation, and that it is only alterable by express stipulations made in the way which has been already stated in the decision. * * *

"Nor can any previous assent to the abuses of a particular firm engaged in the shipping business, though acquiesced in by one who had other dealings with it, be interpreted into an agreement so as to deprive him of a right under an ordinary bill of lading subsequently made."

It was also held in that case that placing the stamp on the back of the bill of lading did not constitute the same a part of the contract to make it binding upon the shipper.

The Court of Appeals of New York in *Hopper v. Sage*, 20 N. E. R. 351, said:

"Usage and custom cannot be proved to contravene a rule of law, or to alter or contradict the express or implied terms of a contract free from ambiguity, or to make the legal rights or liabilities of the parties to a contract other than they are by the terms thereof.

And, in *Cappel. v. Weir*, 90 N. Y. S. 394, the Supreme Court of that State said:

"Custom or usage, general or local, may in some instances be material, but evidence of the custom or usage of a party to an action is certainly incompetent to contradict the express or implied terms of a contract."

If the custom of delivery at Kansas City controls the express terms of a written contract, then such written contract is wholly unnecessary. Both cannot prevail and particularly is this contention sound where it appears, as here, that the alleged custom was not known to either the consignor or the consignee in the bill of lading.

We submit therefore that on the entire record the law is with the shipper. The terms of its contract were violated, resulting in a loss, and it was for the very purpose of making recompense for such loss that the Carmack Amendment was passed.

We, therefore, respectfully ask that the judgment of the Texas Courts be reversed.

Respectfully submitted,

DYER, CROOM & JONES,

A. H. CULWELL,

Attorneys for Petitioner Appellant.

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IN THE
SUPREME COURT OF THE UNITED STATES.

309—
No. ~~309~~, October Term, 1921.

THE CITY NATIONAL BANK OF EL PASO, TEXAS,
Petitioner,

VS.

THE EL PASO & NORTHEASTERN RAILROAD CO., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF
CIVIL APPEALS OF THE EIGHTH SUPREME JUDICIAL
DISTRICT OF TEXAS.

BRIEF FOR RESPONDENTS IN OPPOSITION TO
PETITION.

W. A. HAWKINS,
DEL W. HARRINGTON,
Of El Paso, Texas,
WILLIAM R. HARR,
CHARLES H. BATES,
Of Washington, D. C.,
Attorneys for Respondents.

IN THE
SUPREME COURT OF THE UNITED STATES.

No. 824, October Term, 1921.

THE CITY NATIONAL BANK OF EL PASO, TEXAS,
Petitioner,

VS.

THE EL PASO & NORTHEASTERN RAILROAD CO., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF
CIVIL APPEALS OF THE EIGHTH SUPREME JUDICIAL
DISTRICT OF TEXAS.

**BRIEF FOR RESPONDENTS IN OPPOSITION TO
PETITION.**

The petition for the issuance of a writ of certiorari should be denied because no Federal question of a substantial nature is involved in this case, as presented by the pleadings, and because the judgment sought to be reviewed is clearly right and in strict accordance with the decisions of this Court as to the scope and effect of the Carmack Amendment.

Petitioner sued the carriers for misdelivery of the shipment, while both the lower courts, upon the facts as found by the jury, held that the delivery made was in accordance with the express directions and intentment of the shipper.

After the trial and judgment in the trial court petitioner sought to argue, in the Court of Civil Appeals, as it does here, an issue as to the rights of the shipper, upon an order bill of lading, under the Carmack Amendment, which question the Court of Civil Appeals held was not presented by the pleadings. It is to be noted that this case arose in 1911, prior to the amendments to the Carmack Amendment with respect to bills of lading contained in the Acts of March 4, 1915 (38 Stat. 1197, ch. 176), and August 9, 1916 (39 Stat. 441, ch. 301).

The facts, as found by the jury upon the issues presented to it, and sustained by both the lower courts, show that the petitioner, the Texas Bank, through its agent, J. A. Peters (who was the head of the J. P. Peters Commission Company, Kansas City, Missouri), shipped certain cattle over the lines of the respondents, upon a bill of lading which consigned the shipment to the First National Bank of Kansas City, Missouri. The jury, however, further found that, by mutual mistake of the Texas Bank, through its agent, Peters, and the agent of the respondent carriers, the bill of lading failed to embody the entire agreement of the parties as to the consignee, as it was intended by the shipper that the cattle should be consigned to the First National Bank, Kansas City, Missouri, *care of said Peters Commission Company*. The jury further found, however, that said J. A. Peters, petitioner's

agent, directed the agent of the respondent carrier receiving the cattle at El Paso, to place on the way-bill the notation that the cattle were consigned to the First National Bank of Kansas City, in care of the Peters Commission Company (See Opinion, Ct. Civ. App., Transcript, p. 308, *et seq.*)

Delivery of the cattle was made to the Peters Commission Company at Kansas City, Missouri, in accordance with the actual intention of petitioner, the shipper, and the notation on the way-bill to that effect made by petitioner's agent as above stated.

This suit, therefore, is an effort on the part of the petitioner, the Texas Bank, to hold the carrier to the precise language of the bill of lading with reference to the consignee, notwithstanding said bill of lading did not express the real contract and intention of the parties thereto, and notwithstanding the fact that the petitioner's agent had thereafter specifically directed the agent of the receiving carrier to note on the way-bill that delivery should be made to the Peters Commission Company.

The jury further found that in the case of prior shipments consigned by bills of lading by the Texas Bank to the Kansas City Bank, the delivering carrier delivered the same to the Peters Commission Company prior to the payment of the drafts drawn on the Commission Company attached to the bills of lading; that the Kansas City Bank had notice, prior to the arrival of the shipment in question, of this practice, and that there was a ratification or acquiescence by said bank in such practice of delivering such shipments of cattle to the Peters Commission Company without payment of the drafts attached to the bill of lading; that in re-

liance upon this ratification or acquiescence the delivering carrier delivered the shipment in question in this suit to the Peters Commission Company without payment of the draft attached to the bill of lading; that the acquiescence or ratification of the Kansas City Bank was such as to induce a belief on the part of the agent of the delivering respondent carrier that the Peters Commission Company was duly authorized to receive said cattle for said bank, without payment of the draft attached to the bills of lading; and that if the bill of lading referred to in this case had recited that the cattle were to be delivered to the First National Bank, care of the Peters Commission Company (as the parties thereto really intended it should do), the Texas Bank would not have notified the respondents prior to the delivery to the Commission Company not to deliver said cattle without payment of the draft in the Kansas City Bank. (Transcript, Ct. Civ. App., pp. 42-45, 314-317).

Upon the jury's findings, the trial court rendered judgment for the defendant carriers.

The Court of Civil Appeals, in affirming the judgment of the trial court, after reciting the facts as found by the jury, and, referring to the issue there sought to be made by appellant for the first time that the bill of lading constituted what is commonly known as an "order bill of lading" and "the defendants had not the right to deliver the cattle to anyone but the plaintiff or his order and upon production and surrender of the bill of lading properly indorsed," said (Transcript, pp. 323-325):

"The correctness of the authorities cited is not questioned, but upon the issues presented by ap-

pellant's pleading they have no application here. The substance of the plaintiff's petition has been indicated at some length and it predicated its cause of action upon a contract which it alleged bound the carriers to safely carry the cattle to Kansas City and there deliver the same to the First National Bank, and that defendants had failed and refused to deliver to said Bank, or plaintiff, or to any other person or corporation authorized by the consignor, or the consignee, by the terms of said contract to receive delivery.

"If the contract be reformed so as to show that the cattle were billed to the First National Bank, care of the J. P. Peters Commission Company, then the allegations of the petition would fail for delivery to the Commission Company was shown. It has been a number of times held that where goods are shipped to the consignee, care of another person, it is a sufficient delivery if made to the person in whose care the goods were so shipped.

"Under the contract, as pleaded, the carriers were bound to carry the cattle to Kansas City and there deliver to the First National Bank and the cause of action is predicated upon the failure of the bank to deliver to such consignee or to plaintiff, or to any other person authorized to receive the same. Had the petition declared upon a contract binding the carriers to transport and deliver to the shipper, or his order, the authorities and argument of the appellant would be applicable. Not having declared upon a shipper's order contract which reserves the right of disposition to the shipper, the plaintiff is not entitled to recover simply because his evidence shows a contract of that nature. Evidence however adduced without

pleading to support it will not support a judgment."

Upon the Texas Bank's motion for rehearing the Court of Civil Appeals said (Transcript, pp. 389-390):

"In its motion appellant calls attention to the failure in our opinion to directly pass upon the issue presented under the first assignment of error to the effect that this case should be controlled by the Carmack Amendment to the Hepburn Act of the Federal Congress enacted June 29th, 1906. This law was in effect when the shipment in question was made. In substance that Act provides that any common carrier receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it, or by any common carrier to which such property may be delivered, or over whose lines such property may pass. It is insisted that appellant was the lawful holder of the bill of lading issued in this case at the time the cattle were delivered to the J. P. Peters Commission Company and therefore the case comes within the provisions of the Carmack Amendment. The question in this case, as the suit is brought, is not a question of who is the proper party plaintiff, but a question of whether or not the carrier caused any loss. *As we view it, the Bank caused the loss by directing the carrier (through its agent, Peters) to deliver the cattle to the Peters Commission Company.* Plaintiff's contention in effect is, that in saying 'shall be liable to the lawful holder,' the Carmack Amendment by implication prevents a delivery to any one except the law-

ful holder of the bill of lading, and the question now to be determined is whether this is rigidly to be implied from the Carmack Amendment. As touching upon this question, we quote from the case of *Cincinnati Railway v. Ranking*, 241 U. S. 327, where, in a shipment case, Justice McReynolds said:

“ ‘The rights and liabilities of the parties depend upon the Acts of Congress, the bill of lading, and the common law rules, as applied in Federal Courts.’ ”

After further discussion of the Carmack Amendment the Court of Civil Appeals said, in its opinion on motion for rehearing (Transcript, pp. 392-393, 395, 396, 406-407):

“*The Nebraska Meal Mills v. St. Louis & Southwestern Railway*, reported in the 41st S. W. Reporter, page 810, is almost identical with the case at bar, and is illustrative of the contention which appellees make; namely, that Appellant cannot by its own wrongful action, induce the carrier to make a given delivery, and then, standing upon a rigid technical rule of law, ask the Court to overlook its wrong actions, and to award damages against the carrier for the very delivery which it directed.

“In the *Nebraska Meal Mills* case, above cited, that corporation delivered to the Missouri & Pacific a car load of meal for shipment to E. D. Russell in Arkansas. A bill of lading was issued in which it was stipulated that the meal was to be transported to destination and there delivered to the consignee, Russell. The appellant, without notice to the railroad, drew a sight draft on

Russell for the price of the meal, attached it to the bill of lading, forwarded it to a bank for collection. The bank presented the draft for payment, but Russell was insolvent and failed to pay. The connecting carrier, having no notice that a draft had been drawn on Russell, or that Russell was insolvent, or that the consignor desired to retain control of the meal until the draft was paid, delivered the meal without requiring the production of the bill of lading.

"In that particular case, the Court quotes the bill of lading as having been 'straight', but to our minds it was no more a straight bill of lading than the one in this case is. This is to say, an order bill of lading, in the common acceptance of the term, would read 'City National Bank, consignor, to order of City Bank, consignee, notify Peters Commission Company.'

"The instant bill of lading named the First National Bank of Kansas City as consignee, and as the jury found the facts, the bill of lading must be considered as reading 'Consignee, First National Bank, care J. P. Peters Commission Company.'

"Appellant alleged a breach of an agreement to deliver to the First National Bank of Kansas City, the consignee named in the bill of lading.

"The jury has found that the delivery could lawfully be made care Peters Commission Company, so that, *Appellant's cause of action, as plead by it*, has failed; the delivery to the Commission Company being in view of the jury's finding a delivery to the First National Bank.

"Appellant now relies upon a new cause of

action for delivery without surrender of the bill of lading.

"We think it clear, therefore, that Appellant's reliance upon the rule that the bill of lading, as an order bill, carries the title to the goods, comes too late. The action as brought by it was not founded upon delivery without surrender of the bill of lading, but was a straight suit, to recover against us for failure to deliver to the First National Bank.

"In other words, it seems that appellant is seeking to recover upon an issue not tendered by its pleadings.

"To briefly recapitulate this case, the City Bank never complained in its pleadings that the carrier delivered without the production of the bill of lading. Its sole and only allegation was that the carrier did not deliver to the consignee named in the bill of lading, the First National Bank.

"Upon inquiry before the jury, it has ascertained that J. A. Peters, the agent of the bank, had instructed the carrier to deliver to the Peters Commission Company; that both he and the carrier had intended to put this instruction in the way bill and the bill of lading; that by mutual mistake, they omitted it from the bill of lading; that the carrier, in compliance with instructions, had delivered the cattle to the Peters Commission Company.

"In the face of these findings and upon the issues presented by the appellant's pleadings we see no escape from the conclusion that judgment was properly rendered for the appellees.

"The Carmack Amendment, nor any other law, is intended as an instrument of oppression. The

natural justice with which we are all imbued revolts at the idea of allowing the City Bank to, on the one hand instruct the carrier to deliver the cattle to the Peters Commission Company and on the other hand to sue for damages for not delivering them to the First National Bank."

It will thus be seen that the Court of Civil Appeals did not hold, as petitioner would have this Court imply, that delivery upon an order bill of lading could be made other than as the shipper directed, nor deny petitioner any right under the Carmack Amendment in holding that the delivery was in accordance with the real intendment and orders of the shipper.

As the Court of Civil Appeals said in its opinion (Transcript, p. 390), the facts of this case clearly show that any loss occasioned the Texas Bank was due to its own action (through its agent, Peters) in instructing the carrier to deliver the cattle to the Peters Commission Company.

Under these circumstances, what was said in *Pere Marquette Ry. Co. v. J. F. French Co.*, 254 U. S. 538, applies. In that case this Court, speaking by Mr. Justice Brandeis, said that, while a terminal carrier would be liable for conversion if the delivery of the goods without requiring presentation and surrender of the bill of lading was the cause of the shipper losing his goods (which happened in the *Blish* case, 241 U. S. 383), where the shipper's loss was not caused by such delivery, but by the wrongful surrender of the bill of lading by the bank to whom it had been sent without requiring payment of the shipper's draft, the carrier would not be liable.

The *Pere Marquette* case thus recognizes that delivery of the bill of lading is not always necessary in

order to relieve the carrier of liability. Especially should this be so where, as here, the action of the carrier in making delivery is in pursuance of the express direction of the shipper.

Wherefore respondents pray that the petition be dismissed with costs.

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April, 1922.

FEB 19 1923

WM. E. STANSBURY
CLERK

IN THE
Supreme Court of the United States

No. 309—OCTOBER TERM, 1922.

THE CITY NATIONAL BANK OF EL PASO, TEXAS,
Petitioner,

vs.

EL PASO & NORTHEASTERN RAILWAY CO., ET AL.,
Respondents.

On Writ of Certiorari to the Court of Civil Appeals,
Eighth Supreme Judicial District of the State of
Texas.

BRIEF FOR RESPONDENTS.

W. A. HAWKINS,
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Of El Paso, Texas,
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Texas.

BRIEF FOR RESPONDENTS.

I.

Presumably, the writ of certiorari was issued by the court because of the allegation of petitioner that this case involves a construction of the Carmack Amendment to the Interstate Commerce Act.

The Carmack Amendment, as originally enacted and in force at the time of the transportation involved in this case (October, 1911) provided (34 Stat. 595):

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed. *Provided*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

"That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

In respondents' view, no substantial question under the Carmack Amendment arises in this case because the liability of the respondent carrier issuing the bill of lading referred to in this case, to the "lawful holder thereof," "for any loss, damage, or injury" to the property shipped, "*caused by it*" or *by any other carrier participating in the transportation*, is not questioned in this suit.

What the petitioner seeks, in this action, is to have the respondent carriers held liable for loss to the petitioner *resulting entirely from a compliance with its own instructions*, and also, as we shall see, from its

own negligence. In other words, the Carmack Amendment is laid hold of by the petitioner to accomplish something entirely foreign to the purpose of said Amendment and which is both unjust and inequitable.

The petitioner declared upon the alleged failure of the respondents to deliver the cattle shipped to the First National Bank of Kansas City, in accordance with the duplicate bill of lading issued by the initial carrier. (Amended Petition, Record, p. 3.)

Upon the evidence the jury found that the real intention and agreement of the parties, at the time of the signing of the contract embodied in the bill of lading, was that the cattle should be consigned and delivered to the First National Bank of Kansas City, Mo., care of the J. P. Peters Commission Company at that place, but, by mutual mistake, the words "care of the J. P. Peters Commission Company" were omitted from the bill of lading, although such words were inserted in the way-bill which accompanied the shipment and which was made out at the time the bill of lading was signed.

We quote the following on the above points from the verdict of the jury upon the special issues submitted to it (Record, pp. 21-22, 24-25) :

"We the jury in the above styled and numbered cause return the following answers to the issues submitted to us as our verdict:

Question Number One. Do you find from the evidence, by a preponderance thereof, that contemporaneous with, or just prior to the execution and delivery of the bill of lading covering the shipment of cattle in question in this suit, it was mutually agreed by and between J. A. Peters, acting for The City National Bank, and the agent of the receiving carrier at El Paso, Texas, that such cattle should be consigned by the bill of lading to the First National Bank of Kansas City,

Missouri, care of the J. P. Peters Commission Company?

Answer. Yes.

Question Number Two. Do you find from the evidence, by a preponderance thereof, that when the bill of lading covering the shipment of cattle in question was issued that the same, by the mutual mistake of J. A. Peters, acting on behalf of the City National Bank, and the said agent of the defendant carriers acting in their behalf, omitted to state in the bill of lading in accordance with their mutual agreement, that the cattle were consigned to the First National Bank, care of the J. P. Peters Commission Company, if such agreement there was?

Answer. Yes.

Question Number Three. Do you find from the evidence, by a preponderance thereof, that J. A. Peters directed the agent of the defendant carriers receiving the cattle at El Paso, shipment of which is in question, to place on the way-bill that the cattle were consigned to the First National Bank of Kansas City in care of the J. P. Peters Commission Company?

Answer. Yes.

"Supplemental Question by Court. Was such direction on the part of J. A. Peters to said agent, if you have found he gave such direction, prior to, contemporaneous with or subsequent to the execution and delivery of the bills of lading covering this shipment of cattle.

Answer. Contemporaneous with."

It is to be noted that the bill of lading did not call for the payment of any draft and the surrender of the bill of lading before delivering the cattle. (See Contract, Record, pp. 56-60.)

The shipment in question was the last of a series of eighteen or twenty shipments by the City National

Bank of El Paso to the First National Bank of Kansas City of cattle purchased in Mexico by one Cameron upon which plaintiff had advanced money (Record p. 65), all of said shipments being handled exclusively by J. A. Peters as agent for the plaintiff (Record, pp. 65, 71), said Peters being the son of J. P. Peters of the J. P. Peters Commission Company and also acting in the matter for said Company as well as Cameron, the purchaser of the cattle. (Record, pp. 65, 70.)

The evidence further showed that all of the previous shipments were delivered to the J. P. Peters Commission Company upon their arrival (Record, p. 69), and that, with the exception of some of the earliest ones, all were shipped by said J. A. Peters, as plaintiff's agent, to the First National Bank of Kansas City "care of the J. P. Peters Commission Company," this practice being adopted because of the fact that, in the case of one of the earlier shipments, the bank had been found closed upon the arrival of the cattle and the day's market had been lost. (Record, pp. 69, 71-72.)

Way-bills covering the shipments made October 4th, 5th, 7th, 11th (2 lots), 13th, 23d and 27th, 1911, were put in evidence by defendants, in each of said way-bills the shipment being billed from the plaintiff bank to the "First National Bank of Kansas City, Mo., care J. P. Peters Commission Company." (Record, pp. 75-77.)

One of the duplicate copies of a bill of lading dated October 19th, 1911, covering six carloads of cattle consigned from the plaintiff bank to the "First National Bank of Kansas City, care J. P. Peters Commission Company," was also identified at the trial. (Dawson, Record, p. 80.)

The evidence further showed, and the jury found,

that delivery of said prior shipments, or some of them, had been made by the terminal carrier prior to the payment of the draft attached to the bill of lading, and that such practice was known to said consignee Bank, and that its acquiescence or ratification of such practice was sufficient to induce the belief on the part of the delivering defendant carrier that said J. P. Peters Commission Company was duly authorized to receive said cattle for said First National Bank of Kansas City. (Verdict, Record, pp. 22-23, Questions Numbers Four, Five, Six and Seven.)

The jury further found from the evidence that had the bill of lading recited that the cattle were to be delivered to the First National Bank, care of the J. P. Peters Commission Company, the plaintiff would *not* have notified the defendants, prior to the delivery to the J. P. Peters Company, not to deliver said cattle without payment of the draft in the First National Bank of Kansas City. (Verdict, Record, p. 23, Question Number Four Requested by Plaintiff.)

In short, as the jury found, the cattle were delivered in accordance with the actual agreement between the plaintiff bank and the respondent carrier issuing the bill of lading, and no harm occurred to the plaintiff bank as the result of the mutual mistake of the parties in omitting the words "care of the J. P. Peters Commission Company" from the bill of lading, when naming the First National Bank of Kansas City, Missouri, as the consignee.

The above mentioned findings of the jury were confirmed by both the lower courts, and are not, therefore, open to question here.

II.

Under the circumstances above stated, the Court of Civil Appeals held that the contract between the parties as expressed in the bill of lading should be reformed to express the true agreement between the parties, the Texas Courts having power to administer law and equity in the same suit.

As to the sufficiency of the delivery, the Texas Court of Civil Appeals said (Record, pp. 193-94):

"If the contract be reformed so as to show that the cattle were billed to the First National Bank, care of the J. P. Peters Commission Company, then the allegations of the petition would fail for delivery to the Commission Company was shown. It has been a number of times held that where goods are shipped to the consignee, care of another person, it is a sufficient delivery if made to the person in whose care the goods were so shipped.

Elliott on Railroads (2nd Ed.) Par. 1524a;

Ela vs. Express Co., 29 Wis., 611;

Russell vs. Livingston, 16 N. Y. 515;

Express Co. vs. Hammer (Ind.) 51 N. E. 953.

"In this State it has been often held that the sending of a telegraphic message in care of a third person necessarily constitutes such third person the agent of the sendee with authority to receive the message and that delivery to the third person is sufficient.

Tel. Co. vs. Young, 77 Tex. 245;

Tel. Co. vs. Shaw, 90 S. W. 58.

"There is no reason why the same rule should not apply to a contract of carriage."

The rule of law as to the admissibility of parol testimony to show the real contract between the parties, is no different in respect to a bill of lading than as to any other written instrument:

"Inasmuch as the bill of lading constitutes the contract of shipment, parol evidence is not admissible, *in the absence of fraud or mistake*, to vary its terms or show that the contract was different from that shown by the instrument."

6 Cyc. 420, and authorities there cited.

4 Elliott on Railroads, 2d ed., Sec. 1423.

Petitioner contends that the Carmack Amendment precludes such reformation of the contract. But there is nothing in the Carmack Amendment which forbids the application of this ~~joint~~ and salutary rule in respect of a matter not coming within the inhibitions of that statute nor conflicting with any other provision of the Interstate Commerce Act, at least between the original parties to the transaction. Had the bill of lading been assigned, for value, to a third party ignorant of the real agreement between the parties, a different question would be presented. But the language of the Carmack Amendment will be scrutinized in vain for anything which precludes a court of justice from reforming the receipt or bill of lading required thereby so as to express the actual agreement of the parties, where no third party has intervened whose rights might be prejudiced, and where the real contract is not inconsistent with the purposes of the amendment or any other provision of the Act to Regulate Interstate Commerce.

The provision of the Carmack Amendment is that the initial carrier shall be liable, upon the receipt or bill of lading required to be issued, for any loss or damage *caused by it or by any other participating carrier*. Here, under the facts as found by the jury and confirmed by the two lower courts, the loss complained of was not caused either by the initial carrier or by any of the other carriers concerned in the trans-

portation, but followed entirely from a delivery of the cattle in accordance with petitioner's own instructions.

It is manifest that occasions may arise where the receipt or bill of lading required to be issued by the Carmack Amendment does not contain the entire contract between the parties or all the instructions directed to be given. To hold that, under such circumstances, the entire contract could not be proved, where the omitted provisions were not inconsistent with any purpose intended to be subserved by the Amendment is manifestly uncalled for. *The Carmack Amendment contains its own limitation upon the power of the parties or the courts to reform the receipt or bill of lading when it goes on to declare that "no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed."* Beyond this, the statute is not concerned.

It is also to be observed that the Carmack Amendment does not undertake to extend the liability of the initial carrier to "the lawful holder" of such receipt or bill of lading beyond any loss or damage occasioned by it or the other carriers participating in the transportation. One must look elsewhere for the rules governing the rights and liabilities of the parties to the receipt or bill of lading which are not specifically mentioned in said Amendment. Hence said receipt or bill of lading are not necessarily to be regarded as a full and exclusive expression of all the rights and liabilities of the parties thereto. Hence, also, where the rights of third parties are not involved, there can be no valid objection to reforming the receipt or bill of lading to show the real agreement between the parties as to

matters not dealt with in the Carmack Amendment nor inconsistent therewith.

III.

The decisions of this court relied upon by petitioner can be readily distinguished.

In *Atchison, Topeka & Santa Fe Ry. Co. vs. Robinson*, 233 U. S. 173, cited by petitioner, it was stated that the effect of the Carmack Amendment, as construed by this court, was to give the Federal jurisdiction control over interstate commerce and make supreme the Federal legislation regulating liability for property transported by common carriers in interstate commerce. That case dealt with an attempt by the shipper to substitute an oral agreement with respect to the terms and conditions of a shipment, for the bill of lading required by the Carmack Amendment, said oral agreement providing for rates inconsistent with the lawful tariffs of the carrier on file with the Interstate Commerce Commission, called for by the bill of lading. Under these circumstances, the court held that the shipper as well as the carrier was bound to take notice of the filed tariff rates, which, so long as they remained operative, were conclusive as to the rights of the parties, saying (133 U. S. 180-181):

“To give to the oral agreement upon which the suit was brought, the prevailing effect allowed in this case by the charge in the trial court, affirmed by the judgment of the Supreme Court of the State, would be to allow a special contract to have binding force and effect though made in violation of the filed schedules which were to be equally observed by the shipper and carrier. If oral agreements of this character can be sustained then the door is open to all manner of special con-

tracts, departing from the schedules and rates filed with the Commission. *Kansas City Southern Ry. Co. vs. Carl, supra*, p. 652. To maintain the supremacy of such oral agreements would defeat the primary purposes of the Interstate Commerce Act, so often affirmed in the decisions of this court, which are to require equal treatment of all shippers and the charging of but one rate to all, and that the one filed as required by the act."

This is very far from saying that the bill of lading required by the Carmack Amendment can not be reformed so as to express the real intent of the parties, where such intention is perfectly lawful and proper and not inconsistent either with the provisions of said Amendment or any other regulation of interstate commerce made by Congress.

That the Carmack amendment is to be reasonably and sensibly construed appears from the decisions of this court in *Cincinnati, New Orleans & Texas Pacific Ry. Co. vs. Rankin*, 241 U. S. 319, where it was held not to change the common law doctrine theretofore approved by this court in respect of the carrier's liability for losses occurring on its own lines. In that case the court, speaking by Mr. Justice Reynolds, said:

"The shipment being interstate, rights and liabilities of the parties depend upon acts of Congress, the bills of lading, and common law rules as accepted and applied in Federal tribunals."

In holding that the bill of lading involved in this case could be reformed to express the actual agreement between the parties the State courts were merely applying the general equitable rule on that subject, which in no wise conflicts with the provision and policy of the Carmack Amendment or any other act of Congress

regulating interstate commerce. This is very different from attempting to substitute for the bill of lading required by the Carmack Amendment to be issued by the initial carrier one issued subsequently by a connecting carrier, which was held improper in *Missouri, Kansas & Texas Ry. Co. vs. Ward*, 244 U. S. 383, and *Texas & Pacific Ry. Co. vs. Leatherwood*, 250 U. S. 478, also relied upon by petitioner.

IV.

The authority of J. A. Peters to act for the petitioner and direct delivery as he did, cannot be questioned here, in view of the findings of the jury and the holdings of the two lower courts.

Moreover, the evidence showed that Peters had been placed in complete charge of all these shipments for the petitioner, no other representative of the petitioner ever appearing in the matter. (Record, pp. 65, 70-71.) Even were it otherwise, the carrier was justified, under the circumstances of this case, in relying upon the agent's authority.

American Brake Shoe, etc., Co. vs. Pere Marquette R. Co., 223 Fed. 1018, 1020.

Great Northern Ry. Co. vs. O'Connor, 232 U. S. 508.

V.

It is apparent that the loss suffered by the petitioner was due entirely to its own negligence and not to the negligence of the defendants, who as a matter of fact, complied strictly with the instructions given them.

Petitioner's loss resulted from its giving J. A. Peters—whom it knew to be the agent of Cameron, the

original purchaser of the cattle, and also to be the son of J. P. Peters of the J. P. Peters Commission Company—entire control of these shipments, leaving him free to direct delivery as he pleased, said J. A. Peters, the son, also acting in the matter for said J. P. Peters Commission Company. The evidence is clear and explicit on these points. (See testimony of J. F. Williams, petitioner's Vice-President, Rec., pp. 63, 65, 67, and of J. A. Peters, Rec., pp. 70-73.) Petitioner entrusted J. A. Peters with full authority to make the shipments and give the directions as to their consignment and delivery. Exercising that authority, J. A. Peters directed delivery to the First National Bank of Kansas, care of the J. P. Peters Commission Company, because, as he testified, of the fact that in the case of some of the earlier shipments, the bank had not always been open to receive the shipments when they arrived, "so that by the time we got possession of the cattle and fed and watered them the day's market would be over." (Rec., p. 72.) The method which he thereupon adopted of consigning the cattle to the Kansas City Bank, care of the J. P. Peters Commission Company, the record shows, worked with entire satisfaction to the petitioner down to this last shipment, although, as the jury found, several prior shipments had been delivered to the J. P. Peters Commission Company prior to payment of the drafts attached to the bills of lading with the knowledge and acquiescence of the Kansas City Bank. Only with respect to the last shipment did any mishap occur, and because of that mishap, plainly arising from the over-confidence of petitioner in the judgment and discretion of J. A. Peters, it sought in this action to place the burden of its loss upon the carriers, although they had merely complied with the instructions given them as to deliv-

ery by petitioner through said J. A. Peters, its agent for the purpose.

In this connection it is interesting to note—as the jury found from the evidence, in answering Question No. 4 submitted by plaintiff—that had the bill of lading actually recited that the cattle were to be delivered to the Kansas City Bank, care of the J. P. Peters Commission Company, plaintiff would *not* have notified the defendants, prior to the delivery to the J. P. Peters Commission Company, not to deliver the cattle without payment of the draft in the Kansas City Bank (Rec., p. 23).

VI.

The attempt of the petitioner to bolster up its case by the contention—an evident afterthought—that delivery should not have been made without requiring the surrender of the bill of lading, is also without merit.

The Court of Civil Appeals held this was an attempt to raise a new issue, the petitioner having declared upon a failure to deliver to the proper consignee. It is to be noted that this issue was not among those submitted to the jury.

Furthermore, delivery was not only made as directed, but, in the eye of the law, to the holder of the bill of lading, and the party entitled to receive the shipment, namely, the First National Bank of Kansas City, since delivery to the J. P. Peters Commission Company constituted, under the facts of that case, delivery to the bank, to whom the bill of lading had been forwarded.

Upon this question the Court of Civil Appeals, upon rehearing, said (Record, p. 233):

"These cases show that the implication from the Carmack Amendment for which Appellant contends, namely, that delivery could only be made upon surrender of the bill of lading, is not a right implication, and while there may be cases in which that implication would be applied, still, the general principles of the common law, as said by the Supreme Court, obtain, and the implicated rule is only applied subject to the relative rights, liabilities and duties of the parties as governed by the facts and the form of the action brought.

The *Coovert Case* (141 Pac., 324), upon which appellant relies, is a perfect illustration of this. In that case, delivery was made to the consignee, after the railroad had been notified by the consignor that the bill of lading had been returned to it, and after it had surrendered the bill of lading to the railroad and demanded the goods; clearly, of course, a wrongful delivery."

The books, we think, will be searched in vain to find a case where a delivery has been held to be improper which, like the one involved in this case, was made in strict accordance with the instructions of the shipper and without any subsequent change in such instructions or anything which would serve to put the carrier on notice that such delivery had become improper. Counsel for petitioner apparently have been unable to find any such case. In the elaborate argument made by them in the court below in support of their first assignment of error (Rec., pp. 95-128) they discussed a number of cases supposed to support their contention that there was a misdelivery in this case because the carrier delivered the shipment without requiring surrender of the bill of lading. But an examination of those cases shows that they were all cases in which the shipment was consigned, in the bill of lading, either to the order of the shipper himself, or to a

specified consignee, with instructions "to notify" someone else, or something existed or had occurred to put the carrier on notice that delivery ought not be made without requiring the surrender of the bill of lading. *In other words, in all the cases referred to by counsel there was, in fact, a misdelivery.* Here, the delivery was in accordance with the express instructions given by the shipper and not withdrawn and also (in law) to the party in possession of the bill of lading and entitled to receive the shipment.

Counsel for petitioner also cited a number of textbooks to the effect that the carrier makes delivery of the shipment without requiring the surrender of the bill of lading "at his peril." But an examination of the cases cited in support of this rule shows that this expression merely means that, *if the party to whom delivery is made is not the party entitled to receive the shipment*, under the terms of the bill of lading, the carrier is liable for any loss ensuing. But in the case at bar there was no such misdelivery, because the delivery was made, in the eye of the law, to the First National Bank of Kansas City, which was the holder of the bill of lading and entitled to receive the shipment, the J. P. Peters Commission Company having been authorized by the consignor to receive said shipment for said bank.

It is true that the thirteenth paragraph of the contract embodied in the bill of lading provided for delivery of the cattle "unto the second party (the petitioner) or order." But this provision is to be regarded as superseded by the express consignment of the cattle, in the first paragraph of said contract, to the First National Bank of Kansas City. In other words, the petitioner, in the bill of lading, exercised its power to direct delivery and consigned the cattle,

without reservation or qualification as to payment of draft or otherwise, to the First National Bank of Kansas City. For the purposes of this suit, therefore—no assignment or transfer of the bill of lading having been made—the bill was a straight consignment of the cattle to the Kansas City bank. This being so, it was entirely proper for the carrier to deliver the cattle to the consignee without requiring the surrender of the bill of lading because, presumptively, they were the property of that bank.

“The consignee is the presumptive owner of the things consigned, and a carrier, without notice to the contrary, must regard the consignee as the absolute owner, and a legal delivery to him will discharge the carrier from all liability to the consignor.”

Moore on Carriers, 2d ed., Vol. 1, p. 206.

“Where the carrier receives goods under a contract, either expressed or implied from the marks on the goods, to deliver them to a person named, without any reservation or power of disposal by the consigner, then the delivery to such person, *or his authorized agent*, completes the contract and relieves the carrier from any further liability. This rests on the assumption which the carrier is authorized to entertain that the title to the goods passes to the consignee on delivery to the carrier.”

10 Corpus Juris, 255-256.

In *Schlesinger vs. West Shore Ry. Co.*, 88 Ill. App. 273, it was held that, where goods were consigned to “K” care of “B’s Express,” it was proper for the carrier to deliver the goods to “K” without requiring production of the bill of lading, since by the consignment and delivery of the goods to the carrier to be conveyed to the consignee the property in the goods be-

came vested in the consignee. That case implies that a delivery to "B's Express" would also have been equally good. In fact, the contention there apparently was that, under the terms of consignment, delivery should have been made to the express company.

Had the consignment here involved read, "To order of First National Bank, Kansas City, Mo., *notify* J. P. Peters Commission Company," the petitioner would have had occasion to complain of the delivery to said Company without requiring surrender of the bill of lading.

"A direction in a bill of lading to consigner's order to notify someone else does not relieve the carrier in delivering the property to the person to be so notified without production of the bill of lading. The use of the term 'Notify' shows that the party to be notified was not intended as the consignee but was simply to be advised of the arrival of the goods."

4 Elliott on Railroads, 2 ed., Sec. 1420.

But, manifestly, the words "*care of*" have a very different meaning and effect.

A case in point is referred to by the Texas Court of Civil Appeals, as follows (Record, pp. 233-4):

"*The Nebraska Meal Mills vs. St. Louis & Southwestern Railway*, reported in the 41st S. W. Reporter, Page 810, is almost identical with the case at bar, and is illustrative of the contention which appellees make; namely, that appellant cannot, by its own wrongful action, induce the carrier to make a given delivery, and then, standing upon a rigid technical rule of law, ask the court to overlook its wrong actions, and to award damages

against the carrier for the very delivery which it directed.

"In the Nebraska Meal Mills case, above cited, that corporation delivered to the Missouri & Pacific a car load of meal for shipment to E. D. Russell in Arkansas. A bill of lading was issued in which it was stipulated that the meal was to be transported to destination and there delivered to the consignee, Russell. The appellant, without notice to the railroad, drew a sight draft on Russell for the price of the meal, attached it to the bill of lading, forwarded it to a bank for collection. The bank presented the draft for payment, but Russell was insolvent and failed to pay. The connecting carrier, having no notice that a draft had been drawn on Russell, or that Russell was insolvent, or that the consignor desired to retain control of the meal until the draft was paid, delivered the meal without requiring the production of the bill of lading.

"In that particular case, the Court quotes the bill of lading as having been 'straight,' but to our minds it was no more a straight bill of lading than the one in this case is. This is to say, an order bill of lading, in the common acceptance of the term, would read 'City National Bank, consignor, to order of City Bank, consignee, notify Peters Commission Company.'

"The instant bill of lading named the First National Bank of Kansas City as consignee, and as the jury found the facts, the bill of lading must be considered as reading 'Consignee, First National Bank, care J. P. Peters Commission Company.' "

As the Court of Civil Appeals said, neither the Carmack Amendment nor any other rule of law is intended as an instrument of oppression, and the natural justice with which we are all imbued revolts at the idea of construing said amendment and rules so

as to allow the petitioner to direct delivery as it did and then sue the carrier for damages for complying with its instructions.

It is respectfully submitted, therefore, that the judgment of the Court of Civil Appeals should be affirmed.

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Attorneys for Respondents.

chase price, with bill of lading attached to the consignee bank, with instructions to release the cattle on payment of the drafts, and had ratified delivery of shipments to the commission company before payment of such drafts, and where, on making a further shipment, the direction in care of the commission company was, by mutual mistake of the agent and the receiving carrier, omitted from the bill of lading but at the command of the agent was noted on the way bill and the terminal carrier delivered the cattle of this shipment to the commission company without surrender of the bill of lading or payment of the draft, and the draft was not paid, held, that the terminal carrier had a right to assume that delivery might properly be made to the commission company, and that delivery so made was delivery to the consignee bank; hence the provisions of the Carmack Amendment had no application. 225 S. W. 391, affirmed.

CERTIORARI to a judgment of the Court of Civil Appeals of Texas, affirming a judgment for the respondent railroad companies in an action by the petitioner bank to recover for their alleged failure to make delivery of a shipment of cattle in accordance with a bill of lading issued by the initial carrier.

Mr. A. H. Culwell for petitioner.

Mr. William R. Harr, with whom *Mr. W. A. Hawkins*, *Mr. Del W. Harrington* and *Mr. Charles H. Bates* were on the brief, for respondents.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This action was commenced in the District Court of El Paso County by the petitioner to recover \$10,101.18 for alleged failure to deliver, in accordance with a shipping contract, 847 head of cattle shipped October 27, 1911, by the petitioner from El Paso, Texas, to Kansas City, Missouri, over the connecting lines of railway of respondents,¹ there to be delivered to the First National Bank of

¹ The other respondents are: El Paso & Southwestern Company, El Paso & Northeastern Railway Company, El Paso & Rock Island

that city. Judgment for the respondent was affirmed by the Court of Civil Appeals of the Eighth Supreme Judicial District of Texas (225 S. W. 391). The Supreme Court of the State denied a writ of error. On petitioner's application, asserting that federal rights claimed by it in the state courts under the Carmack Amendment (c. 3591, 34 Stat. 595) are denied by the judgment, the case was brought here on certiorari.

The petitioner declared upon alleged failure of respondents to deliver the cattle to the First National Bank of Kansas City, in accordance with a bill of lading issued by the initial carrier; it alleged the value of the cattle to be \$20,000 and claimed \$10,101.18 on account of failure by the carriers to deliver the cattle to the consignee named.

The shipment in question was the last of 18 or 20 train-load shipments of cattle by petitioner from El Paso to Kansas City. The record shows that for some time prior to the date of this shipment, one Cameron had been buying cattle in the interior of Mexico and shipping them to Juarez, whence they entered the United States at El Paso. A bank of Chihuahua furnished the money to pay for the cattle. That bank consigned them to petitioner at El Paso, making draft with bill of lading attached, for the amount of the purchase price. After the cattle were delivered to the petitioner on the American side, it paid the draft and refunded the purchase price to the Chihuahua bank. It then shipped the cattle to Kansas City for sale. J. P. Peters was a cattle broker doing business in Kansas City under the name of J. P. Peters Commission Company. His son, J. A. Peters, was employed by Cameron. He also acted for the petitioner, and all of the shipments were handled exclusively by him as its agent. All of the previous shipments were delivered to the commission com-

pany, Chicago, Rock Island & El Paso Railway Company, Chicago, Rock Island & Gulf Railway Company, and Chicago, Rock Island & Pacific Railway Company.

pany upon arrival at Kansas City, and, with the exception of some of the earliest, were shipped by him to the First National Bank of Kansas City "care of the J. P. Peters Commission Company." This practice was adopted because the bank was closed at the time one of the earlier shipments arrived, and the day's market was lost.

At the time of the shipment in question, a bill of lading was issued by the receiving carrier signed by its agent and by the "City National Bank, By J. A. Peters, Shipper." The waybill contemporaneously made designated the consignee "First National Bank, Kansas City, Mo., care J. P. Peters Commission Company. . . ." The petitioner made a draft, with bill of lading attached, on the commission company and forwarded it to the bank at Kansas City, with directions to release the cattle on payment of the draft, and to wire petitioner for instructions, if the draft was not paid. The terminal carrier delivered the cattle to the commission company without surrender of the bill of lading or the payment of the draft. The bank returned the bill of lading and the draft to the petitioner. The draft has never been paid in full, and this action is to recover the amount remaining unpaid. The jury found that, at the time of the execution of the bill of lading, it was agreed between the petitioner, acting through J. A. Peters, and the receiving carrier, that the cattle should be consigned by bill of lading to the First National Bank of Kansas City, Missouri, care of the J. P. Peters Commission Company; that through mutual mistake, the bill of lading omitted the words "care of the J. P. Peters Commission Company," and that the petitioner through its said agent, directed the agent of the receiving carrier to note on the waybill that the cattle were consigned to the First National Bank of Kansas City, care of the J. P. Peters Commission Company. The jury also found that prior shipments of cattle above referred to had been delivered by the terminal carrier to the com-

mission company before the payment of drafts to which the bills of lading were attached, and that the First National Bank acquiesced in and ratified such deliveries; that in reliance on such acquiescence and ratification, the terminal carrier delivered the shipment in question to the commission company without the surrender of the bill of lading, and that such acquiescence or ratification was reasonably sufficient to induce the belief that the commission company was authorized to receive the cattle for the bank.

The petitioner complained that the carrier failed to deliver the cattle to the bank named as consignee or to the petitioner. If delivery was made to that bank, or to the petitioner, or on its order, the carriers did not commit any breach alleged, and there can be no recovery.² And if, as in the case of previous shipments, the contract had read "First National Bank of Kansas City, Mo., care of J. P. Peters Commission Company", delivery to the commission company would have been performance of the agreement. See *Ela v. American Merchants' Union Express Co.*, 29 Wis. 611, 616; *Bell v. Windsor & Annapolis Ry. Co.*, 24 N. S. 521. The bank had ratified the delivery of prior shipments to the commission company before payment of drafts accompanying bills of lading. The terminal carrier had a right to assume that delivery of this shipment properly might be made to the commission company. J. A. Peters acted for the petitioner in making all of the shipments. He directed the prior shipments to be made to the consignee bank in care of the commission company. At his instance the waybill directed delivery of this shipment to the named consignee in care of the commission company. His orders and directions were binding on the petitioner. Thus in legal

² See decision of this case in Court of Civil Appeals, 225 S. W. 391, 400, holding that the petition alleging failure to deliver to consignee would not support recovery for a delivery without surrender of bill of lading.

effect the petitioner at the time it made the shipment expressly ordered delivery to be made to the consignee bank in care of the commission company, and caused the agent of the receiving carrier to so direct on the waybill. We think it must be held that, under these circumstances, delivery to the commission company was delivery to the consignee bank.

This being so, the provisions of the Carmack Amendment have no application.

The judgment of the Court of Civil Appeals is affirmed. Deliver the cattle to the bank named as consignee for the petitioner. If delivery was made to that bank or to the petitioner or on its order the carriers did not

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